No. 17585

United States
Court of Appeals
for the Ninth Circuit

RAY B. WOODBURY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon.

Phillips & Van Orden Co., 4th & Berry, S. F., Calif.—Rec. 2/14/62—Printed 4/4/62

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[Clerk's Note: When deemed likely to be of an important nature errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

KING, MILLER, ANDERSON, NASH &
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For Appellee.

The United States District Court
for the District of Oregon

Civil No. 9403

RAY B. WOODBURY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

For a first cause of action plaintiff alleges:

I.

Plaintiff is now and at all times herein mentioned was a citizen and resident of the state of Oregon. Aleutian Homes, Inc., is now and at all times herein mentioned was a corporation organized and existing under the laws of the state of Oregon. Plaintiff is the owner of 799 shares of common stock of said Aleutian Homes, Inc., out a total of 800 shares authorized, issued and outstanding.

II.

The Housing and Home Finance Administration, hereinafter referred to as HHFA, is an agency of the United States of America. The Housing and Home Finance Administrator, hereinafter referred to as Administrator, is the head of said agency and is responsible for the general supervision and coordination of the functions of the constituent agen-

cies of the HHFA. During the year 1952, and until sometime in the year 1953, Raymond M. Foley was the duly appointed and acting Administrator. Albert M. Cole succeeded said Raymond M. Foley as Administrator and now is and at all times since has been the duly appointed and acting Administrator.

III.

The Federal Housing Administration, hereinafter referred to as FHA, is an agency of the United States of America. The Federal Housing Commissioner, hereinafter referred to as Commissioner, exercises all the powers of the FHA. FHA is a constituent agency of HHFA.

IV.

The Federal National Mortgage Association, hereinafter referred to as FNMA, is a body corporate created by the Congress of the United States and is a constituent agency of HHFA.

V.

This action is brought pursuant to the provisions of Title 28, U.S.C.A., Sections 1346(b) and 2671 through 2680. The matter in controversy, exclusive of costs, exceeds the sum of $3,000.

VI.

In 1951 and 1952, the Secretary of Navy expressed interest in securing, as an aid to national defense, the construction of a housing project for naval personnel in the Kodiak, Alaska, area to re-

lieve an acute shortage of housing facilities then existing.

VII.

In 1952 the Secretary of Navy requested the construction of such housing project be undertaken and requested that the FHA extend appropriate mortgage insurance commitments to cover said project in the total amount of $4,700,000.

VIII.

Subsequent to said request and on or about February 29, 1952, plaintiff caused Aleutian Homes, Inc., to be incorporated under the laws of Oregon. Said Aleutian Homes, Inc., was incorporated for the purpose of owning, constructing and operating said housing project in Kodiak, Alaska. In order to induce Aleutian Homes, Inc., to construct said housing project, FHA, acting on the request of the Secretary of Navy, issued firm commitments for mortgage insurance covering the houses in said project.

IX.

Further in order to induce Aleutian Homes, Inc., to construct said project, FNMA issued commitments to purchase the FHA insured mortgages in the total amount of $4,700,000.

X.

In order to induce Aleutian Homes, Inc., to construct said project so that housing facilities would be available to naval personnel in the area of Kodiak, Alaska, and in order to further the de-

clared policy of Congress to assure the maintenance of industrial capacity for the production of prefabricated houses and house components so that such capacity might be available for the purpose of national defense, the HHFA agreed to loan Aleutian Homes, Inc., the sum of $4,230,000, which constituted 90 per cent of the amount of said FHA and FNMA commitments. Said loan from HHFA was intended as interim financing for said project, which loan was to be repaid out of the proceeds of the mortgage financing pursuant to the FHA and FNMA commitments hereinabove set forth. An actual total of $4,192,717.10 was advanced by HHFA for the construction of said project.

XI.

On or about April 27, 1953, said loan authorization, together with all other required contracts and documents, was executed by Aleutian Homes, Inc.

XII.

Pursuant to the aforementioned commitments and loan authorization, construction of said housing project commenced in 1953.

XIII.

By reason of certain difficulties unforeseen by plaintiff and Aleutian Homes, Inc., but anticipated and known to HHFA, its agents and employees, construction of said project fell behind schedule and by the end of 1953 only a portion of the construction of said project was completed.

XIV.

Because lien claimants and other creditors threatened to prevent the completion of said housing project urgently needed by naval personnel and because HHFA, FHA and FNMA desired to complete said project in the interest of national defense, on or about February 26, 1954, HHFA formulated and entered into a completion agreement with plaintiff, Aleutian Homes, Inc., creditors and other interested parties in which HHFA undertook to pay all creditors then existing, to take whatever steps were necessary to complete the construction of said project, and to operate said project until permanent financing arrangements were completed.

XV.

Pursuant to said completion agreement, HHFA assumed complete and exclusive control over the construction of said project, including complete and exclusive control over the conduct of Aleutian Homes, Inc., and all other aspects and phases of the construction and operation of said project. In carrying out said completion agreement HHFA selected a project manager, to be located in Portland, Oregon, who was subject to the complete and exclusive authority and direction of HHFA. All disbursements of funds and receipts of moneys were directed and controlled exclusively by HHFA. Said complete and exclusive control over the construction and operation of said project by HHFA was exercised continuously from February 26, 1954, until on or about June 14, 1957, at which time

HHFA secured an order from the United States District Court for the District of Alaska appointing a receiver to take full control of said project.

XVI.

On or about October 26, 1954, actual construction of said project was completed. From July 1, 1954, until June 14, 1957, HHFA collected and reserved to its own use, rents from said housing project in the sum of $1,114,800.20.

XVII.

In entering into said completion agreement and in reliance thereon plaintiff was induced to advance and did advance during the year 1954, to the aforementioned project manager the sum of $75,000 to be used as overhead to complete said project, which said sum upon the completion of the project was to be repaid to plaintiff out of the mortgage funds to be advanced by FNMA.

XVIII.

In entering into said completion agreement and in assuming complete and exclusive control over the construction and operation of said project in the interest of national defense, HHFA entered into and occupied a fiduciary relation with respect to plaintiff, Aleutian Homes, Inc., creditors and other interested parties to said completion agreement.

XIX.

In approximately May, 1955, HHFA, in exercising said complete and exclusive control over the

construction and operation of said project, in undertaking the payment of creditors and in the carrying out of said completion agreement, permitted the then existing commitments of FHA and FNMA, with respect to permanent long-range financing of said project, to terminate and lapse in order to effectuate alternative long-range financing of said project.

XX.

In breach of its fiduciary obligation to secure permanent long-range financing for said project, in lieu of financing in accordance with the commitments of its constituent agencies, FHA and FNMA, the HHFA, its agents and employees, carelessly and negligently failed and neglected or deliberately and willfully refused to secure such financing, and in breach of said fiduciary duties and obligations on or about May 28, 1957, did seize the bank account of Aleutian Homes, Inc., compelling the payment from it of $122,300, and on or about June 11, 1957, in the United States District Court for the District of Alaska, Third Judicial Division, Anchorage, commenced foreclosure proceedings in the name of the United States of America against Aleutian Homes, Inc., a corporation; Pacific Alaska Contractors, Inc., a corporation; Alex B. Carlton, doing business as Carlton Lumber Company, City of Kodiak, a municipal corporation of the Territory of Alaska; James C. Dougherty, Trustee under the Will of Hugh Dougherty; Lee Bettinger, Jack Hinckel; M. Justin Herman and David Oliver, as Trustees; Lindley R. Durkee and Melvin Frazier,

as Trustees; and "Also all other persons or parties unknown claiming any right, title, estate, lien or interest in the real estate described in the complaint herein," defendants, Civil No. A-13,484, to collect the balance of moneys due on the interim loan used for the construction of said project and to foreclose the interest of plaintiff, Aleutian Homes, Inc., the unpaid creditors and other parties interested in said project and in the assets thereof.

XXI.

By reason of the negligent and wrongful acts and omissions of the employees of the Government of the United States of America as hereinabove set forth, plaintiff has suffered damages in the amount of $75,000.

For a second cause of action plaintiff alleges:

I.

Incorporates herein paragraphs I through XVI of the first cause of ction.

II.

To be paid out of the funds to be advanced by FNMA for the purchase of permanent mortgages were claims of The Bank of California, N.A., for $150,000, together with interest thereon from September 21, 1953. By reason of the failure of HHFA to pay said claim and by reason of his liability as an accommodation indorser to the note which represented said claim of The Bank of California, N.A., plaintiff has paid interest thereon in the

amount of $14,594.80 and has paid principal in the amount of $150,000, no part of which has been repaid to plaintiff from any source. Said payments of interest and principal were made by plaintiff upon the following dates in the following amounts:

Date of Payment	Amount Paid	Credited to
Feb. 18, 1954	$ 1,083.33	Interest
June 2, 1954	1,875.00	Interest
Aug. 20, 1954	1,875.00	Interest
Dec. 6, 1954	1,895.83	Interest
May 18, 1955	3,750.00	Interest
May 18, 1955	41,455.00	Principal
May 18, 1955	14,526.43	Principal
June 13, 1955	2,352.75	Principal
July 11, 1955	2,352.75	Principal
Aug. 12, 1955	890.56	Interest
Sept. 13, 1955	285.31	Interest
Sept. 13, 1955	2,063.69	Principal
Sept. 28, 1955	658.25	Principal
Oct. 10, 1955	653.27	Interest
Oct. 10, 1955	25,591.13	Principal
June 11, 1956	787.92	Interest
July 6, 1956	1,499.58	Interest
July 6, 1956	61,000.00	Principal

III.

Incorporates herein paragraphs XVII through XX of the first cause of action.

IV.

By reason of the negligent and wrongful acts and omissions of the employees of the Government of the United States of America as herein above set forth, plaintiff has suffered damages in the amount of $164,594.80.

For a third cause of action plaintiff alleges:

I.

Incorporates herein paragraphs I through XVI of the first cause of action.

II.

To be paid out of the funds advanced by FNMA for the purchase of permanent mortgages was a claim by the General Casualty Company of America for $28,750.85, together with interest thereon at the rate of 6 per cent per annum from June 9, 1953, until paid. By reason of the failure of HHFA to pay said claim and by reason of the personal guaranty on the part of plaintiff given as an accommodation, judgment for the amount of said claim, together with interest, expenditures, attorneys' fees and costs was entered against plaintiff in the United States District Court for the District of Oregon on June 24, 1956. On September 18, 1956, said judgment was paid and satisfied by the payment by plaintiff of the sum of $33,542.09. In the defense of said action plaintiff incurred legal fees and other necessary expenses in the sum of $2,412.93.

III.

Incorporates herein paragraphs XVII through XX of the first cause of action.

IV.

By reason of the negligent and wrongful acts and omissions of the employees of the Government

of the United States of America as hereinabove set forth, plaintiff has suffered damages in the amount of $35,955.02.

For a fourth cause of action plaintiff alleges:

I.

Incorporates herein paragraphs I through XVI of the first cause of action.

II.

Commencing in 1951 and until the execution of the loan authorization and other documents on April 27, 1953, plaintiff had advanced out of his own personal funds necessary expenses incurred in the preparation for said project the sum of $150,000. In order to place the priority of said claims of plaintiff behind the claims of other creditors and to delay repayment of said moneys, 1,500 shares of preferred stock of Aleutian Homes, Inc., at $100 per share par value, were authorized for issuance to plaintiff to be fully paid for by the cancellation of the claims represented by said cash advances. Said shares were to be redeemed by Aleutian Homes, Inc., at the completion of the project out of the funds to be advanced by FNMA for the purchase of permanent mortgages.

III.

Incorporates herein paragraphs XVII through XX of the first cause of action.

IV.

By reason of the negligent and wrongful acts and omissions of the employees of the Government of the United States of America as hereinabove set forth, plaintiff has suffered damages in the amount of $150,000.

For a fifth cause of action plaintiff alleges:

I.

Incorporates herein paragraphs I through XVI of the first cause of action.

II.

Subsequent to the completion agreement and during the years 1954, 1955 and 1956, plaintiff advanced and paid on behalf of Aleutian Homes, Inc., to satisfy various claims and charges in addition to those set forth in the first, second, third and fourth causes of action herein, the net sum of $9,297.04. Said disbursements and advances were made by plaintiff with the full knowledge of the HHFA and with the understanding and intention that plaintiff would be reimbursed for said disbursements and advances out of the funds to be advanced by FNMA for the purchase of permanent mortgages.

III.

Incorporates herein paragraphs XVII through XX of the first cause of action.

IV.

By reason of the negligent and wrongful acts and

omissions of the employees of the Government of the United States of America as hereinabove set forth, plaintiff has suffered damages in the amount of $9,297.04.

For a sixth cause of action plaintiff alleges:

I.

Incorporates herein paragraphs I through XVI of the first cause of action.

II.

The present fair market value of said housing project exceeds $5,800,000. The claims to be paid under the completion agreement, which were to be paid out of the funds made available from permanent long-range financing, including the redemption of the 1,500 shares of preferred stock held by plaintiff in the amount of $150,000, are in the total sum of $5,370,805.97. The equity in said project held by Aleutian Homes, Inc., which equity is in the process of being foreclosed by the HHFA in the action now pending in the United States District Court for the District of Alaska, as hereinabove set forth, exceeds the sum of $429,194.03. By reason of the negligent and wrongful acts and omissions of the employees of the government, as hereinabove set forth, the equity held in said project by Aleutian Homes, Inc., has been damaged and destroyed, so that said equity is of no present value. Plaintiff now owns 799 shares of common stock of said Aleutian Homes, Inc., out of a total of 800 such shares authorized, issued and

outstanding. The damage to and destruction of said equity of Aleutian Homes, Inc., has injured plaintiff to the extent of 799/800 of the value of said equity.

III.

Incorporates herein paragraphs XVII through XX of the first cause of action.

IV.

By reason of the negligent and wrongful acts and omissions of the employees of the Government of the United States of America hereinabove set forth, plaintiff has suffered damages in the amount of $428,127.

Wherefore, plaintiff demands judgment against defendant as follows:

1. With respect to the first cause of action, the sum of $75,000.

2. With respect to the second cause of action, the sum of $164,594.80.

3. With respect to the third cause of action, the sum of $35,955.02.

4. With respect to the fourth cause of action, the sum of $150,000.

5. With respect to the fifth cause of action, the sum of $9,297.04.

6. With respect to the sixth cause of action, the sum of $428,127.

7. For his costs incurred herein.

KING, MILLER, ANDERSON,
NASH & YERKE,

/s/ NORMAN J. WIENER,

/s/ PAUL R. MEYER,
Attorneys for Plaintiff.

[Endorsed]: Filed September 30, 1957.

[Title of District Court and Cause.]

MOTION TO DISMISS AND IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Comes now the United States of America, defendant herein, appearing by C. E. Luckey, United States Attorney for the District of Oregon, and respectfully moves the Court that the above-entitled cause be dismissed on the following grounds:

1. The Complaint does not state facts to constitute a claim upon which relief can be granted.

2. The Complaint shows on its face that the alleged tortious act occurred in "approximately May, 1955" and the records of this Court show that the action was not filed until September 30, 1957, and thus the action has been tolled by Title 28, United States Code, Section 2401.

3. The acts complained of as allegedly tortious are not within the provisions of the Federal Tort

Claims Act because they allegedly arose under circumstances showing the exercise of a discretionary function incognizable under the Federal Tort Claims Act by reason of Title 28, United States Code, Section 2680(a).

4. That the acts complained of may not subject the defendant to damages as an interference with contract relations by reason of Title 28, United States Code, Section 2680(h).

5. Particularly referring to plaintiff's sixth cause of action, defendant moves to dismiss the said cause of action because the plaintiff has alleged no facts giving him standing to sue.

6. Particularly referring to plaintiff's sixth cause of action, defendant moves to dismiss the said cause of action because the plaintiff has failed to join Aleutian Homes, Inc., an indispensable party to said cause of action.

In the alternative the defendant respectfully moves the Court that summary judgment be entered in favor of the defendant pursuant to Rule 56, Federal Rules of Civil Procedure, because the United States of America was not a party to the completion agreement complained of in the complaint, a copy of which is hereto attached as Exhibit A, and the parties to the agreement waived any rights against the Housing and Home Finance Agency arising from actions taken by and under the agreement.

Respectfully submitted,

/s/ C. E. LUCKEY,
United States Attorney for the District of Oregon,
of Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed February 14, 1958.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO DISMISS

This matter coming on for hearing on April 28, 1958, upon defendant's motion to dismiss and in the alternative for summary judgment, and the court having heard argument thereon, and briefs having been submitted thereon by both parties hereto, and the defendant at said hearing having withdrawn its alternative motion for summary judgment, and the court being fully advised in the premises, now, therefore, it is hereby

Ordered that defendant's motion to dismiss be and the same hereby is denied with leave to defendant to renew said motion at the time of pretrial.

Dated this 28th day of April, 1958.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed April 28, 1958.

[Title of District Court and Cause.]

ANSWER

United States of America, Defendant, answering the complaint herein, respectfully shows this court as follows:

First Cause of Action

I-IV.

Defendant admits the allegations of Paragraphs I, II, III, and IV.

V.

Answering Paragraph V, defendant admits that this action purports to be brought under Title 28, USCA, Secs. 1346(b) and 2671 through 2680, but denies that such provisions confer jurisdiction upon this Court as the cause of action alleged herein is not cognizable under those sections of the law. The Government admits that the matter in controversy, exclusive of costs, exceeds the sum of $3,000.00.

VI.

Answering Paragraph VI, defendant is uninformed as to whether in 1951 and 1952 the Secretary of the Navy "expressed interest" in securing the construction of a Housing Project at Kodiak, Alaska, and therefore denies said allegation.

VII.

Defendant denies each and all of the allegations in Paragraph VII.

VIII.

Defendant admits the first two sentences of Paragraph VIII. Defendant admits that FHA in accordance with Section 203 of the National Housing Act, as amended, issued commitments to Brice Mortgage Company, an approved FHA mortgagee, to insure mortgages on the 344 dwellings to be built in the housing project, provided such mortgages were in conformity with the law and with the rules, regulations and requirements of FHA. Defendant denies that FHA in issuing said commitments acted upon the request of the Secretary of the Navy and denies that in issuing said commitments FHA did so in order to induce Aleutian Homes, Inc., to construct said housing project.

IX.

Defendant admits that Federal National Mortgage Association ("FNMA") issued commitments to Brice Mortgage Company to purchase at par such FHA insured mortgages as might be executed on the dwellings in the housing project, provided that such insured mortgages were in conformity with the requirements of FNMA. Defendant denies that FNMA in issuing said commitments did so in order to induce Aleutian Homes, Inc., to construct said project.

X.

Defendant admits that HHFA agreed to lend to Aleutian Homes, Inc., the sum of $4,230,000 in accordance with the provisions of the Loan Authorization dated Januray 15, 1953, as amended, a copy

of which is annexed hereto as Exhibit 1. Defendant admits that said loan was intended as interim financing for said project and alleges that it was a condition to the granting of said loan and to the disbursement thereof that Aleutian Homes, Inc., should provide permanent financing. In accordance with such requirement Aleutian Homes, Inc., entered into a certain take-out agreement dated June 2, 1953, as amended, a copy of which and copies of the amendments to which are annexed hereto as Exhibits 2, 3, and 4. Defendant admits that HHFA advanced $4,192,717.10 for the construction of the project. Except as so admitted, the allegations of paragraph X are denied.

XI.

Answering Paragraph XI, defendant denies that Aleutian Homes, Inc., on or about April 27, 1953, executed a Loan Authorization. Defendant admits that on or about April 27, 1953, the said Aleutian Homes, Inc., executed various instruments, contracts and other documents, among others being the following:

(a) Note dated April 27, 1953, in the principal amount of $4,230,900.00 with interest at 5% per annum, payable to defendant and due December 31, 1953, the maturity of which was extended to become due October 31, 1955.

(b) Deed of Trust conveying and mortgaging the Housing Project, real estate and appurtenances

to Trustees as security for the payment of the aforesaid note.

(c) Building Loan Agreement dated April 27, 1953, executed by Aleutian Homes, Inc., pursuant to which the said Aleutian Homes, Inc., agreed to construct said Housing Project with the proceeds of the aforesaid loan, such construction to be completed by October 31, 1953, the date of completion being later extended to September 24, 1954.

(d) Take-out Agreement dated June 2, 1953, as amended, executed by Brice Mortgage Company and Aleutian Homes, Inc., and plaintiff (hereinafter called "Woodbury"), in accordance with which Brice Mortgage Company, at the instance of Aleutian Homes, Inc., and Woodbury, agreed, in conformity with the requirements of the Loan Authorization, to furnish permanent financing for the Housing Project.

XII.

Answering Paragraph XII, defendant admits that construction of said Housing Project commenced in 1953.

XIII.

Answering Paragraph XIII, defendant admits that the construction of such Project did fall behind schedule, and that by the end of 1953 only a portion of the construction of said Project was completed. Defendant denies, that such failure in maintaining the schedule of construction was due to difficulties unforeseen by Woodbury and Aleutian Homes, Inc., but anticipated and known to defendant, and alleges

that certain of the difficulties, including the submission to defendant of false and misleading applications for payment, were known to plaintiff and concealed from defendant. Defendant admits that work on said Housing Project came to a halt in November 1953, with the Project in an incomplete state of construction, and mechanics' liens and other claims were filed or asserted by various creditors, alleging that moneys due them for work, materials and services supplied or furnished by them remained due and unpaid.

XIV.

Defendant denies (except as otherwise stated herein) each and all of the allegations in Paragraph XIV and alleges that Woodbury and Aleutian Homes, Inc., following the abandonment of construction, desired to salvage whatever equity said Aleutian Homes, Inc., possessed in the said Housing Project, and to pay off the claims relating thereto. In the interest of doing so, said Aleutian Homes, Inc., and Woodbury and other persons formulated among themselves and presented to the Administrator of HHFA an Agreement contemplating the completion of the Housing Project, the disbursement of the balance of the proceeds of the government loan, and the payment, to the extent feasible, of claims and debts relating to said Housing Project, which said Agreement Aleutian Homes, Inc., and Woodbury urged the Administrator to sign and accept. The Administrator declined to sign any such Agreement but agreed to offer no objection

thereto, and, accordingly, Aleutian Homes, Inc., Woodbury and others entered into and executed a certain Completion Agreement dated April 24, 1954, a true and correct copy of which is attached hereto and made a part hereof as Exhibit 5. As appears from said Completion Agreement, neither the Administrator nor the defendant undertook any obligation whatsoever to complete the said Project or to obtain permanent financing or to operate said Project until permanent financing arrangements were completed. The obligation to furnish permanent financing remained incumbent upon Aleutian Homes, Inc.

XV.

Defendant admits that by reason of the default in payment of the obligation of Aleutian Homes, Inc., evidenced by its Note, it instituted proceedings for the foreclosure of the mortgage security and the collection of the debt in a certain proceeding filed in the United States District Court for the District of Alaska, sitting at Anchorage, in a cause entitled United States of America v. Aleutian Homes, Inc., et al., wherein the Court appointed a Receiver to take possession and custody of the mortgaged Housing Project and the collateral security for the indebtedness of said Aleutian Homes, Inc., to the United States. Except as so admitted, defendant denies the allegations of Paragraph XV. Defendant alleges that the complete control, direction and management relating to the completion and operation of the Housing Project was vested in a certain Project Manager appointed, named and designated

by said Aleutian Homes, Inc., as its Agent, in a certain Agreement (herein called "Project Management Agreement") dated April 24, 1954, executed by said Aleutian Homes, Inc., and approved in writing by Woodbury, a copy of which is annexed hereto as Exhibit 6.

XVI.

Answering Paragraph XVI, defendant admits that the actual construction of said Project was completed during the latter part of 1954. Defendant denies that HHFA collected and reserved to its own use rental from said Housing Project in the sum of $1,114,800.20. Defendant alleges that all such rentals and revenues were collected by Aleutian Homes, Inc., and placed to its credit and account in the United States National Bank, Portland, Oregon, in Special Account No. 3, under Depository Agreement dated May 6, 1954, permitting the disbursement of such funds by said Aleutian Homes, Inc., from said special account, but only for authorized and legitimate purposes upon the counter-signature of the Administrator or his designee.

XVII.

Defendant denies each and all of the allegations of Paragraph XVII. Defendant alleges that Woodbury, for the purpose of inducing the defendant to disburse the balance of the proceeds of the Government loan, executed a certain Overhead Agreement dated April 24, 1954, a true and correct copy of which is annexed hereto as Exhibit 7. Under the

terms of said Agreement, Woodbury obligated himself to pay to the Government the sum of $15,000 a month for overhead expenses in connection with the completion and operation of said Project. Woodbury made such payments for a period of five months, aggregating $75,000.00, but failed and refused to pay the monthly installments of $15,000 due thereafter, and said default continues to this date.

XVIII.

Defendant denies each and all of the allegations of Paragraph XVIII, and specifically denies that it entered into any fiduciary relationship with Woodbury, Aleutian Homes, Inc., or others, and denies that the Completion Agreement establishes or purports to establish any such relation.

XIX.

Defendant denies each and all of the allegations of Paragraph XIX, and alleges that it was the obligation of Aleutian Homes, Inc., to furnish permanent financing to pay the interim loan made by the Government to said Aleutian Homes, Inc., and that it was the obligation of Aleutian Homes, Inc., to meet all requirements and conditions of FHA and FNMA for the issuance of commitments and for maintaining in full force and effect any and all FHA and FNMA commitments with respect thereto, including the Take-out Agreement, as amended, of Brice Mortgage Company. Notwithstanding such obligation, the said Aleutian Homes, Inc., and Woodbury, determined that the costs of meeting the

conditions required to maintain said FHA and FNMA commitments in full force and effect were too high and the said Aleutian Homes, Inc., and Woodbury requested the defendant, in writing, for leave for said Aleutian Homes, Inc., to permit such commitments to lapse. A true and correct copy of such written request is attached hereto as Exhibit 8. The defendant offered no objection thereto, and Aleutian Homes, Inc., and Woodbury caused such commitments to lapse and terminate.

XX.

Defendant denies each and all of the allegations of Paragraph XX, except that it admits that foreclosure proceedings were filed in the United States District Court for the District of Alaska, in the proceedings entitled United States of America v. Aleutian Homes, Inc., et al., and except that the defendant admits that it caused $122,300.00 to be withdrawn from Special Account No. 3 held in the United States National Bank, Portland, Oregon, in accordance with the provisions of the Depository Agreement dated May 6, 1954, relating to such Special Account. The Depository Agreement expressly provides that upon the default by Aleutian Homes, Inc., in the payment of its indebtedness, the Administrator may withdraw the funds in such Special Account for application on the amount due the defendant. Defendant alleges that it never assumed the obligation to secure for Aleutian Homes, Inc., permanent financing; this was the express obligation of Aleutian Homes, Inc.

XXI.

The defendant denies each and all of the allegations of Paragraph XXI.

Second Cause of Action

I.

Answering Paragraph I, defendant realleges Paragraphs I to XVI inclusive, of its Answer to the first cause of action.

II.

Answering Paragraph II, defendant denies the allegations thereof for lack of knowledge and information sufficient to form a belief as to their truth.

III.

Answering Paragraph III, defendant realleges Paragraphs XVI to XX, inclusive, of its Answer to the first cause of action.

IV.

Defendant denies the allegations of Paragraph IV.

Third Cause of Action

I.

Answering Paragraph I, defendant realleges Paragraphs I through XVI, inclusive, of its Answer to the first cause of action.

II.

Answering Paragraph II, defendant denies the

allegations thereof for lack of knowledge or information sufficient to form a belief as to their truth.

III.

Answering Paragraph III, defendant realleges Paragraphs XVII through XX, inclusive, of its Answer to the first cause of action.

IV.

Defendant denies the allegations of Paragraph IV.

Fourth Cause of Action

I.

Answering Paragraph I, defendant realleges Paragraphs I to XVI, inclusive, of its Answer to the first cause of action.

II.

Defendant denies the first sentence of Paragraph II for lack of knowledge or information sufficient to form a belief as to its truth, and denies that any agreement exists that shares of preferred stock, owned by Woodbury, were to be redeemed by Aleutian Homes, Inc. Any such redemption of such shares of preferred stock (a) would be unlawful and in fraud of creditors until all debts of Aleutian Homes, Inc., including its indebtedness to defendant, are first paid; (b) if made, should be paid in cash to defendant as the pledgee of such shares of preferred stock, and in accordance with the assignment to defendant in the Standby Agreement dated April 27, 1953, executed by Woodbury.

III.

Answering Paragraph III, defendant realleges Paragraphs XVII through XX, inclusive, of its Answer to the first cause of action.

IV.

Defendant denies the allegations of Paragraph IV.

Fifth Cause of Action

I.

Answering Paragraph I, defendant realleges Paragraphs I through XVI, inclusive, of its Answer to the first cause of action.

II.

Answering Paragraph II, defendant denies each and every allegation thereof.

III.

Answering Paragraph III, defendant realleges Paragraphs XVII through XX, inclusive, of its Answer to the first cause of action.

IV.

Defendant denies the allegations of Paragraph IV.

Sixth Cause of Action

I.

Answering Paragraph I, defendant realleges Paragraphs I through XVI, inclusive, of its Answer to the first cause of action.

II.

Defendant denies each and all of the allegations of Paragraph II. Defendant alleges that the present fair market value of said Housing Project is substantially less than the amount now due and owing defendant. Defendant further alleges that the 799 shares of common stock in the name of Woodbury were heretofore pledged, assigned and delivered to defendant as security for the indebtedness of Aleutian Homes, Inc., and the obligations of said Woodbury, and the said Woodbury has no right, title or interest in said shares until the indebtedness and obligations due defendant are paid and discharged in full.

III.

Answering Paragraph III, defendant realleges Paragraphs XVII through XX, inclusive, of its Answer to the first cause of action.

IV.

Defendant denies the allegations of Paragraph IV.

Second Defense

The Complaint fails to state a claim upon which relief can be granted.

Third Defense

The Complaint is not cognizable under the Federal Tort Claims Act, and the Court is therefore without jurisdiction of the subject matter thereof.

Fourth Defense

The claims asserted by Plaintiff are barred by the Statute of Limitations.

Fifth Defense

The alleged Agreement as set forth in the Complaint, by an officer or employee of the United States with Aleutian Homes, Inc., to find, obtain, and cause some third party to discharge the indebtedness of Aleutian Homes, Inc., to the United States, is void and not binding upon the United States and cannot give rise to a cause of action against the United States.

Wherefore, defendant prays that the Complaint herein be dismissed, with costs.

/s/ C. E. LUCKEY,
United States Attorney.

[Endorsed] Filed June 2, 1958.

[Title of District Court and Cause.]

PRETRIAL ORDER

On the 15th day of July, 1960, the above-entitled action came on for pretrial before the undersigned judge of the above-entitled court; plaintiff appeared by and through King, Miller, Anderson, Nash & Yerke, Norman J. Wiener, and Paul R. Meyer, of his attorneys, and defendant appeared by C. E. Luckey, United States Attorney for the Dis-

trict of Oregon, of attorneys for the defendant. Thereupon, the following proceedings were had.

Statement of the Case

Plaintiff has commenced this action alleging jurisdiction pursuant to the Federal Tort Claims Act (Title 28, USCA, §§ 1346(b) and 2671 through 2680). Plaintiff filed the complaint on September 30, 1957, alleging Oregon residence and ownership of 799 of 800 shares of stock of a total of 800 issued of Aleutian Homes, Inc.

Plaintiff alleges that after the Secretary of the Navy had expressed interest in securing housing for naval personnel at Kodiak, Alaska, the Federal Housing Administration issued firm commitments for mortgage insurance for a housing project to be owned, constructed and operated by Aleutian Homes, Inc., and that Federal National Mortgage Association issued firm commitments to purchase the Federal Housing Administration insured mortgages in the total amount of $4,700,000. Plaintiff further alleges that in furtherance of a policy to maintain prefabricated house production capacity, and support the needs of naval personnel, the Housing & Home Finance Agency agreed to lend Aleutian Homes, Inc., $4,230,000 constituting 90% of the amount of the FHA and FNMA commitments, as an interim loan, and that HHFA advanced a total of $4,192,717.10 for the construction of the project, and that loan documents for said loan were executed on or about April 27, 1953.

Plaintiff alleges that unforeseen difficulties delayed the construction schedule, and that completion was threatened by lien creditors and claimants and that HHFA formulated and entered into a completion agreement with plaintiff, Aleutian Homes, Inc., creditors and others, by which HHFA undertook to pay existing creditors, cause completion of the project and operate it until permanent financing arrangements were completed. Plaintiff alleges that pursuant to the completion agreement, HHFA assumed complete control of the project from February 26, 1954, until about June 14, 1957, when HHFA allegedly secured an order from the U. S. District Court for Alaska appointing a receiver. Plaintiff further alleges completion of the project, about October 26, 1954, and that HHFA collected and reserved to its own use, rents from the project amounting to $1,114,800.20.

Also, that plaintiff, under the completion agreement, advanced $75,000 as overhead to complete the project, to be repaid from FNMA mortgage purchase.

Plaintiff alleges that HHFA entered into the completion agreement and occupied a fiduciary relationship to the plaintiff, Aleutian Homes, Inc., creditors, and other interested parties thereto, and complains and alleges that in approximately May 1955, HHFA permitted the commitments of FHA and FNMA to lapse, and carelessly and negligently or deliberately and wilfully refused to secure long-range financing, seized the bank account of Aleu-

tian Homes, Inc., and commenced foreclosure proceedings against the project in the name of the United States of America against named parties and others claiming interest in the real estate described in the complaint, being Civil A-13484, Third Judicial District, Anchorage, Alaska.

Plaintiff thereafter complains that he was damaged in the amount of $75,000 and adding an allegation that among the claims to be paid out of the FNMA mortgage purchase was a claim of $150,000 to the Bank of California, NA, which plaintiff was obliged to pay with interest as an accommodation endorser, totaling $164,594.80, for which sum plaintiff asserts a second cause of action.

As a third cause of action, plaintiff alleges that he was compelled to pay a bond premium by reason of a personal guaranty, together with costs incident to the defense of the claim and interest, which plaintiff alleges was also to be paid from the FNMA funds. Plaintiff seeks $35,955.02 on this count, including $2,412.93 legal fees.

As a fourth cause of action, alleging that he was to be paid therefor, from FNMA funds, plaintiff claims $150,000 for preferred stock shares exchanged for initial advances which the plaintiff alleges were to be redeemed by Aleutian Homes, Inc., from FNMA funds by the mortgage purchasers.

A fifth cause of action has been abandoned by plaintiff for unidentified disbursements claimed.

A sixth cause of action contends that Aleutian Homes, Inc., has an equity in the project based upon an asserted fair market value of $5,800,000 against alleged claims payable under the completion agreement in the total amount of $5,370,805.97, and plaintiff claims damage for 799/800ths of the difference, or $428,127.

Defendant filed a motion to dismiss, which the court denied, with leave to renew at pretrial. Defendant renews the motion.

In the motion, defendant moves dismissal on grounds: (1) The complaint fails to state facts to constitute a claim upon which relief can be granted; (2) that the complaint shows on its face that the alleged tortious act occurred in "approximately May 1955," and the records of this court show that the action was not filed until September 30, 1957, and is barred by 28 USC 2401; (3) that the complained of acts would not be actionable because they involve the exercise of a discretionary function under 28 USC 2680(a); (4) that the acts complained of could not subject the defendant to damages, as an interference with contract relations, by reason of 28 USC 2680(h); (5) that as to plaintiff's sixth cause of action, he has alleged no facts giving him standing to sue; (6) that as to plaintiff's sixth cause of action, he has failed to join Aleutian Homes, Inc., an indispensable party.

Defendant has also filed an answer and counterclaim and amended counterclaim.

In its answer, defendant denies that the allegations of the complaint are cognizable under the Federal Tort Claims Act, admits the incorporation of Aleutian Homes, Inc., for the purposes of owning, constructing and operating the project, and alleges that FHA issued commitments to Brice Mortgage Company, an approved FHA mortgagee, to under Section 203 of the National Housing Act, as amended, insure mortgages on the 344 dwellings to be built in the housing project, provided the mortgages conformed with FHA requirements.

Defendant asserted that FNMA issued commitments to Brice Mortgage Company to purchase at par, such FHA-insured mortgages as might be executed on the dwellings in the housing project, provided the insured mortgages conformed with the requirements of FNMA.

Defendant admits that HHFA agreed by an amended loan authorization attached as an exhibit to the answer, to lend Aleutian Homes, Inc., $4,230,900 in accordance therewith, as interim financing, conditioned upon Aleutian Homes, Inc.'s providing permanent financing, and that in accordance with such requirement, Aleutian Homes, Inc., entered into take-out agreements, copies of which are attached as exhibits, by which Brice Mortgage agreed to disburse mortgage loans on FHA-insured dwellings in the project, the proceeds to apply on the HHFA loan until it be paid in full.

Defendant denies plaintiff's allegation that plaintiff executed a loan authorization and alleged that

among other documents, Aleutian Homes, Inc., on or about April 27, 1953, executed a note dated April 27, 1953, in the principal amount of $4,230,900, with interest at 5% per annum, payable to defendant and due December 31, 1953, the maturity of which was thereafter extended to October 31, 1955, a deed of trust as security for payment of the note, a building loan agreement, pursuant to which Aleutian Homes, Inc., agreed to construct said project with the proceeds of said loan by October 31, 1953, later extended to September 24, 1954, and the take-out agreement by which Brice Mortgage Company agreed with Aleutian Homes, Inc., in conformity with the loan authorization, to furnish permanent financing for the housing project.

The defendant admits that construction fell behind schedule, but alleges that the difficulties were unknown to defendant and the submission of false and misleading applications for payment were known to the plaintiff and concealed from the defendant and that thereafter liens and claims halted construction. Defendant denies that HHFA formulated and entered a completion agreement following abandonment of construction, and alleges that plaintiff Woodbury and Aleutian Homes, Inc., desired to salvage any possible equity in and pay off the claims relating to the project, and formulated among themselves and presented to the Administrator of HHFA an Agreement, contemplating completion of the Housing Project, the disbursement of the balance of the proceeds of the government loan,

and the payment to the extent possible of claims and debts relating to said Housing Project, which Agreement Aleutian Homes, Inc., and Woodbury urged the Administrator to sign and accept. Defendant asserts that the Administrator declined to sign any such Agreement but agreed to offer no objection thereto, and accordingly Aleutian Homes, Inc., Woodbury, and others, entered into and executed a certain Completion Agreement, dated April 24, 1954, of which a copy was attached as an exhibit to the Answer. Defendant asserts that under the Completion Agreement neither the Administrator nor the defendant undertook any obligation to complete the project or obtain permanent financing or to operate the project until permanent financing arrangements were completed—but that the obligation to furnish permanent financing remained incumbent upon Aleutian Homes, Inc.

Defendant admits institution of foreclosure proceedings and that the Court appointed a receiver to take possession of the mortgaged Housing Project and the collateral security of the said Aleutian Homes, Inc., to the United States. Defendant further asserts that the complete direction and management relating to the completion and operation of the Housing Project was vested in a Project Manager appointed by Aleutian Homes, Inc., as its agent in a "Project Management Agreement," dated April 24, 1954, executed by Aleutian Homes, Inc., and approved in writing by plaintiff Woodbury, a copy of which is attached to the Answer.

Defendant denies HHFA collected rents and reserved them to its use. Defendant asserts that the rentals were collected by Aleutian Homes, Inc., and placed to its account in a special account under Depository Agreement, dated May 6, 1954, permitting disbursement for authorized purposes upon countersignature of Administrator or his designee.

Defendant further asserts that to induce the defendant to advance the balance of the proceeds of the loan plaintiff executed an overhead agreement on April 24, 1954, copy being annexed as an exhibit to the Answer, by which it is alleged Woodbury obligated himself to pay $15,000 per month for overhead expenses in the completion of the project, but after five months, defaulted on future due installments.

Defendant specifically denies entering into any fiduciary relationship and denies that the Completion Agreement establishes or purports to establish such relationship.

Defendant alleges that it was the obligation of Aleutian Homes, Inc., to furnish permanent financing to pay the interim loan made by the government, to meet all requirements of FHA and FNMA for commitments, and their remaining in force, including the take-out agreement with Brice Mortgage Company, but that Aleutian Homes, Inc., and Woodbury determined that the costs of maintaining the commitments of FHA and FNMA in force were too high and Aleutian Homes, Inc., and Woodbury

made a written request for leave for Aleutian Homes, Inc., to permit the commitments to lapse. A copy of the request was attached as an exhibit to the Answer.

Defendant admits that it caused $122,300 to be withdrawn from the rental deposit account in accordance with the provisions of the Depository Agreement dated May 6, 1954, which expressly authorized the Administrator in event of default to withdraw said funds and apply them on the debt due defendant. Defendant alleges it never assumed the obligation to secure permanent financing but that this was the express obligation of Aleutian Homes, Inc.

Defendant generally denies other allegations of Count I of the Complaint.

Defendant generally urges the same answer to the plaintiff's second and third causes of action.

Defendant generally urges the same answer to the plaintiff's fourth cause of action but in addition alleges that redemption by Aleutian Homes, Inc., of Woodbury's shares of preferred stock would be unlawful and in fraud of creditors until all debts of Aleutian Homes, Inc., including those to defendant are first paid, and if redeemed should be paid to defendant in cash as the pledgee of such shares and in accordance with the assignment to the defendant in the Standby Agreement dated April 27, 1953, executed by plaintiff Woodbury.

Defendant generally urges as to Count VI of the Complaint the answer to Count I and further alleges that the present fair market value of the housing project is substantially less than the sum due and owing to defendant and that the 799 shares of common stock in the name of Woodbury were pledged and assigned and delivered to defendant as security for the indebtedness of Aleutian Homes, Inc., and the obligation of Woodbury, and Woodbury has no right, title or interest in the shares until the indebtedness due defendant be paid in full.

As additional defenses the defendant alleges:

As a second defense that the Complaint fails to state a claim upon which relief can be granted, as a third defense the Complaint is not cognizable under the Federal Tort Claims Act and that the Court is therefore without jurisdiction of the subject matter of the action, for a fourth defense that the claims of the plaintiff are barred by the statute of limitations, and as a fifth defense that the alleged agreement to find, obtain and cause some third party to discharge the indebtedness of Aleutian Homes, Inc., to the United States is void and not binding on the United States and cannot give rise to a cause of action against the United States.

* * *

In addition to reasserting the defenses pleaded in this pretrial order (pages 3 to 7, inclusive herein), the defendant asserts by contention as additional defenses to the complaint:

1. The defendant's motion to dismiss the Complaint should be allowed.

2. That the United States can be made a fiduciary only by its express consent, and no such consent has been given herein.

3. That the plaintiff, not having sought relief in the foreclosure proceedings of which he complains, the results of which alone can determine the worth of Aleutian Homes, Inc., stock, should be estopped and barred from his asserted causes of action herein, or in the alternative the proceedings under the Complaint in this action should be abated until conclusion of the proceedings in Civil A-13484, Third Judicial District of Alaska.

4. That by reason of paragraphs 13 and 18 of the Completion Agreement, the Borrower's Request dated April 23, 1954, the Standby Agreement executed April 27, 1953, and by other collateral documents and writings executed by plaintiff, he is estopped to assert the action herein.

5. That the statutory authority alleged by plaintiff as a basis for suit against the Administrator of HHFA, not made a party herein, does not waive the immunity of the United States, defendant herein.

6. That the decisions of the Administrator to not advance further funds to extend the FHA and FNMA commitments, and to foreclose were discretionary functions and not actionable under 28 USC 2680(a).

7. That insofar as plaintiff appears to rely on allegations that the Administrator or other officials of the defendant misrepresented circumstances relating to occupancy, long-term finance or other expectations or conditions, such allegations give rise to no cause of action by reason of 28 USC 2680(h).

8. That plaintiff has failed to allege any negligent or wrongful act or omission of defendant proximately causing the damages complained of, the defendant committed no negligent or wrongful act, and no negligent or wrongful act or omission of defendant was the cause of the damages asserted by plaintiff.

* * *

The parties, subject to the approval of the Court stipulate and agree that the issues raised by defendant's motion to dismiss, and the controverted issue of alleged fiduciary status of the defendant be segregated from and heard in advance of the other issues raised.

The parties further stipulate and agree that the pleadings insofar as they are enlarged by the contentions of the parties herein shall be deemed amended to conform to this pretrial order.

It is further agreed by the parties that:

(1) Plaintiff makes no contention that the plaintiff executed a Loan Authorization.

(2) Plaintiff makes no contention as to Count I of the Amended Counterclaim that the defendant is not the real party in interest.

(3) Plaintiff makes no contention that Aleutian Homes, Inc., did not duly execute an Assignment of Claims dated April 23, 1954, a copy of which is attached to the Amended Counterclaim.

Agreed Facts

The following agreed facts shall be considered as evidence for all purposes, subject only to objections as to relevancy.

I. Government Agencies Involved

A. Housing and Home Finance Agency and Housing and Home Finance Administrator.

HHFA was created by the Reorganization Plan No. 3 of 1947 (61 Stat. 954, 5 U.S.C.A., Section 133y-16). Under this plan the various functions of the government relating to housing were consolidated within HHFA. At present, HHFA consists of five constituent agencies or units dealing with various aspects of the national housing program:

(1) Federal Housing Administration (hereinafter referred to as "FHA"), an agency created by the President pursuant to authorization by Congress, which engages in programs of mortgage insurance.

(2) Federal National Mortgage Association, a statutory corporation (hereinafter referred to as "FNMA"), which provides a secondary market for the purchase and discounting of mortgages.

(3) Urban Renewal Administration, an agency concerned with programs of urban renewal and slum clearance.

(4) Public Housing Administration, an agency which deals with programs relating to federally financed housing.

(5) Community Facilities Administration (hereinafter referred to as "CFA"), an agency which engages in a variety of programs relating to housing and community facilities not covered by the other four constituent agencies. CFA was formerly called the Community Facilities and Special Operations branch (CF&SO), but the change in its name did not affect its functions or authority. Among the programs administered by CFA were those related to Alaska housing and prefabricated housing.

The agencies related to Urban Renewal and Public Housing had no connection with the Aleutian Homes project.

The Housing and Home Finance Administrator (hereinafter referred to as "Administrator") is the head of HHFA and is responsible for the general supervision and coordination of the statutory functions of the constituent agencies of HHFA.

1. Prefabricated Housing Program

The original interest of the government in prefabricated housing was contained in the Veterans Emergency Housing Act of 1946, 60 Stat. 207, Chapter 268, Section 12(a). The government func-

tions relating to this program of prefabricated housing were, at that time, vested in the Reconstruction Finance Corporation, a corporation (hereinafter referred to as "RFC"). The powers of RFC which were applicable to its functions in the field of prefabricated housing were set out in 15 U.S.C.A., Section 603. The powers and functions of RFC which related to prefabricated housing were transferred to HHFA by Reorganization Plan No. 23 of 1950 (64 Stat. 1279; 5 U.S.C.A., Section 133z-15), as limited by statute. By Title 12 U.S.C. Section 1723(d) the functions of HHFA under Section 2 of Reorganization Plan No. 22 of 1950 were transferred to FNMA August 2, 1954.

Provisions for the making of loans for prefabricated housing were added as Section 102a of the Housing Act of 1948 (62 Stat. 1268) by the Critical Defense Housing Areas Act of 1951 (65 Stat. 293; 12 U.S.C.A., Section 1701g-1).

The powers given the Housing and Home Finance Administrator with respect to prefabricated housing, set forth in 12 U.S.C.A., Section 1701g-2, include the following:

(A) All the powers and functions transferred to him by Reorganization Plan No. 23 of 1950.

(B) The powers, functions and duties set forth in 12 U.S.C.A., Section 1749a, except subsection (c)(2) thereof.

(C) The power to "take any and all actions determined by him to be necessary or desirable

in making, servicing, compromising, modifying, liquidating, or otherwise dealing with or realizing on loans thereunder. Such powers, functions, and duties may be exercised in the several States, the District of Columbia, and the Territories and possessions of the United States."

Included in the powers of the Administrator, set forth in Section 1749(c) to which reference is made in Section 1701g-2(B) as being applicable to the prefabricated housing program, are the following:

"(3) sue and be sued;

"(4) foreclose on any property or commence any action to protect or enforce any right conferred upon him by any law, contract, or other agreement, and bid for and purchase at any foreclosure or any other sale any property in connection with which he has made a loan pursuant to this subchapter. In the event of any such acquisition, the Administrator may, notwithstanding any other provision of law relating to the acquisition, handling, or disposal of real property by the United States, complete, administer, remodel and convert, dispose of, lease and otherwise deal with, such property: Provided, That any such acquisition of real property shall not deprive any State or political subdivision thereof of its civil or criminal jurisdiction in and over such property or impair the civil rights under the State or local laws of the inhabitants on such property;

"(5) enter into agreements to pay annual sums in lieu of taxes to any State or local taxing author-

ity with respect to any real property so acquired or owned;

"(6) sell or exchange at public or private sale, or lease, real or personal property, and sell or exchange any securities or obligations upon such terms as he may fix;

"(7) obtain insurance against loss in connection with property and other assets held;

"(8) subject to the specific limitations in this subchapter, consent to the modification, with respect to rate of interest, time of payment of any installment of principal or interest, security, or any other term of any contract or agreement to which he is a party or which has been transferred to him pursuant to this subchapter; and;

"(9) include in any contract or instrument made pursuant to this subchapter such other covenants, conditions, or provisions as he may deem necessary to assure that the purposes of this subchapter will be achieved."

2. Independent Offices Appropriation Act of 1955

The Independent Offices Appropriation Act of 1955 passed on June 24, 1954, as Ch. 359, 68 Stat. 272 (83rd Cong. 2 Sess., Public Law 428) established as of June 30, 1954, a revolving fund with which the Administrator could account for all assets and liabilities in connection with various programs, including

"* * * functions transferred under Reorganization Plan No. 23 of 1950 (5 U.S.C. 133z-15, note), or authorized under Sections 102, 102a, 102b, and 102c of the Housing Act of 1948, as amended (12 U.S.C. 1701g-1701g-3 [Prefabricated Housing Program]); * * * notes or other obligations purchased pursuant to the Alaska Housing Act, as amended (48 U.S.C. 484(a)); * * *"

It was further provided

"That said fund shall be available for all necessary expenses (including administrative expenses) in connection with the liquidation of the programs carried out pursuant to the foregoing provisions of law, including operation, maintenance, improvement, or disposition of facilities, and for disbursements pursuant to outstanding commitments against moneys herein authorized to be credited to said fund, repayment of obligations to the Treasury, and refinancing and refunding operations on existing loans * * *"

After non-payment of its note, the Aleutian Homes, Inc., project was included in the liquidating program administered by HHFA under the revolving fund established by this Act.

B. Federal Housing Administration.

FHA was established in 1934 with powers as codified in 12 U.S.C.A., Section 1702. It was transferred as a constituent agency to HHFA by Reorganization Plan No. 3 of 1947 (61 Stat. 954, 5 U.S.C.A., Section 133y-16). The powers to insure

conventional mortgages on individual houses are contained in Title II, Section 203, of the National Housing Act of 1934 (48 Stat. 1248, Chapter 847, 12 U.S.C.A. 1709). That section was amended by the Housing Act of 1954 (68 Stat. 591) to change the value ratio of loans which FHA is authorized to insure thereunder.

Under the provisions of the Alaska Housing Act, FHA was given authority to insure mortgages in Alaska in a dollar amount up to 50 per cent higher than its authority with respect to mortgages on property located in the United States. Further it gave FHA authority to insure mortgages in Alaska without the requirement, applicable to housing in the states, that the commissioner find the project to be economically sound or an acceptable risk (63 Stat. 57, 65 Stat. 315, 12 U.S.C.A., Section 1715d).

C. Federal National Mortgage Association

The creation of FNMA and the establishment of its powers is set out in 12 U.S.C.A., Sections 1716 through 1723d.

FNMA was transferred from the jurisdiction of RFC to HHFA to be "administered subject to the direction and control" of HHFA by Reorganization Plan No. 22 of 1950 (64 Stat. 1277, 5 U.S.C.A., Section 133z-15, as limited by statute. By Title 12 U.S.C. Section 1723(d) and functions of HHFA under Section 2 of Reorganization Plan No. 22 of 1950 were transferred to FNMA August 2, 1954.

* * *

V. Development of Project

A. Original Interest

Commencing in 1949, the possibility of securing additional housing for naval and civilian personnel connected with the Kodiak Naval Base in Alaska was discussed among Navy officials, officials of the Alaska Housing Authority, officials of the City of Kodiak and officials of FHA. The possibility of securing housing under the Wherry Act (Title VIII of the National Housing Act, as amended) was considered and rejection and studies were then made with respect to the possibility of construction of an off-base project of some 350 to 400 houses using conventional FHA assistance under Title II, Section 203, of the National Housing Act, as amended.

During 1950-1951, arrangements were made to secure, as a site for this project, certain land belonging to the federal government under the control of the Bureau of Land Management of the Department of Interior. Arrangements were made to transfer this land to the Alaska Housing Authority for reconveyance to the City of Kodiak for use for a project to be built by a sponsor selected by the City of Kodiak. Subsequently, in accordance with law, the Alaska Housing Authority conveyed the land directly to the approved sponsor. It was determined that the City of Kodiak would provide streets, the city and Department of Interior through Alaska Public Works would provide

water and sewer facilities and schools and the local REA would provide power. During 1951, the City of Kodiak received a commitment from the Alaska Public Works program for money to construct the sewer and water facilities in connection with the proposed project.

During 1950 and 1951 considerable surveying of the site and engineering was carried on on behalf of the City of Kodiak and a Raymond Lewis of Los Angeles who was a proposed sponsor for the project. In late 1951, Mr. Lewis abandoned interest in sponsorship of the proposed project.

During 1951, plaintiff became interested in the promotion of a house panel invented by an architect, S. C. Horsley. In late 1951, plaintiff financed a trip by Horsley, R. A. Blanchard and G. K. Gosling to Alaska to investigate the possibility of selling the Horsley panel for use in houses in Alaska. In the course of this promotion, Lee C. Bettinger, the Mayor of Kodiak, was contacted by Gosling and commenced to interest plaintiff to become sponsor of the proposed project in the place of Raymond Lewis.

B. Formation of Aleutian Homes, Inc.

In February 1952, Aleutian Homes, Inc., was incorporated under the laws of the State of Oregon and in February or March 1952, the City of Kodiak approved Aleutian Homes, Inc., as the sponsor of the proposed housing project. Thereafter, the Alaska Housing Authority conveyed the land selected for the site to Aleutian Homes, Inc.

C. Financing of Project

1. Long-term Financing

(a) Individual Mortgages by Private Company

The proposed project was intended to be financed under the provisions of Title II, Section 203, of the National Housing Act, as amended. Under this program, a private mortgage agency takes out individual long-term mortgages on each house included in the project. With respect to the Kodiak project, Brice Mortgage Company was selected to act as the permanent mortgagee.

(b) Insurance of Private Mortgage by FHA.

In order to enable Brice Mortgage Company to sell the mortgages which it intended to obtain on each of the houses in the project, it was necessary for Brice Mortgage Company to obtain a commitment from FHA to insure said mortgages.

In accordance with FHA requirements with respect to the insurance of a project located in Kodiak, Alaska, the Secretary of Navy in 1951, with respect to Raymond Lewis and again in 1952 with respect to Aleutian Homes, Inc., certified to FHA (1) the critical urgent need of the Navy for 385 family units for use by military and civilian personnel at the Kodiak Naval Base, (2) the permanency of the Kodiak Naval Base, and (3) the ability of such military and civilian personnel to pay rentals for such units in the amount of $100, $130 and $150 for small two, large two and three

bedroom units, including garage and kitchen equipment.

In 1952, FHA appraised the value of a 344 unit project at $5,904,250 and in April 1952, issued for a stated period its conditional commitment to Brice Mortgage Company to insure long-range individual mortgages on each home in a total amount of $4,706,400, which amount was based on 80 per cent of the FHA appraised value.

(c) Purchase of FHA Insured Mortgages by FNMA.

Also in 1952, FNMA issued its commitment to Brice Mortgage Company to purchase at par the individual long-range mortgages as they were obtained by Brice Mortgage Company and insured by FHA.

The $4,706,400 to be received from the long-term financing was to be used by Aleutian Homes, Inc., for

(1) repayment of the construction loan from HHFA $4,230,900; (2) payment of costs of taking out the permanent individual mortgages; and (3) any balance remaining as capital.

2. Short-term Interim Loan for Construction Purposes from HHFA

During 1952, Aleutian Homes, Inc., and Brice Mortgage Company found it impossible to secure from private sources the financing required for

the construction of the project prior to the obtaining of the long-range financing as set forth above, and sought assistance from HHFA.

During 1952, negotiations were had between Brice Mortgage Company, acting on behalf of Aleutian Homes, Inc., and the Community Facilities and Special Operations Branch of HHFA for the purpose of securing an interim loan for construction purposes. A final application was made by Aleutian Homes, Inc., late in 1952 and approved in January, 1953. This interim construction loan by HHFA was in the sum of $4,230,900, which constituted 90 per cent of the amount of the FHA and FNMA commitments with respect to the permanent long-range financing, the application indicating the difference between the projected costs and the loan amount applied for would be provided for by the Sponsor, Aleutian Homes, Inc.

The loan was authorized by a Loan Authorzation signed by the Administrator, and carried into effect by documents required by a Building Loan Agreement, including a guaranty of the Loan Agreement and the guaranty of the construction contract by R. B. Woodbury, and a promissory note and deed of trust. Procedures for disbursement under the loan were provided for in a Loan and Disbursement Agreement executed by R. B. Woodbury as President, Aleutian Homes, Inc., April 27, 1953. The construction contracts and stock of Aleutian Homes, Inc., were assigned to the Administrator. A Standby Agreement was executed by R. B. Woodbury, Presi-

dent, Aleutian Homes, Inc., and R. B. Woodbury, individually. Performance bonds run to Aleutian Homes, Inc., and the Administrator.

D. Contractual Arrangements for Construction of Project.

Contractual arrangements for the construction of the project under the interim loan from HHFA were signed in Seattle, Washington, on April 27, 1953. In general they provided as follows: Aleutian Homes, Inc., as the owner entered into a "general contract" with Kodiak Construction Co., for the construction of the housing project for the payment of the sum of $4,230,900 (the total maximum amount of the HHFA loan). Kodiak Construction Co., as general contractor in turn contracted with three subcontractors, plus a freight company, the total payment under which subcontracts, plus freight, similarly equaled the sum of $4,230,900 (the maximum total amount of the HHFA loan). These subcontracts were as follows:

1. A "supply contract" entered into with Alex B. Carlton, doing business as Carlton Lumber Company, for the purchase of the prefabricated housing packages.

2. A "site construction contract" entered into with Pacific Alaska Contractors, Inc., for preparation of the site.

3. A "construction contract" entered into with Leo S. Wynans Co., Inc., for the erection of the prefabricated houses on the prepared sites.

4. A contract with Coastwise Line for the transportation of prefabricated house packages and other materials from Portland, Oregon, to Kodiak, Alaska.

VI. Construction of Project to November, 1953

During the summer of 1953, certain difficulties arose in the preparation of the site and a controversy developed between Kodiak Construction Co., speaking through Leo S. Wynans, its agent, and Pacific Alaska Contractors, Inc. At the time of this controversy Pacific Alaska Contractors, Inc., ceased further work on the site preparation and Kodiak Construction Co., under the direction of Wynans proceeded to furnish labor and materials required under the site construction contract.

In October and November, 1953, financial difficulties arose in connection with the construction of the project, and, on November 6, 1953, Pacific Alaska Contractors, Inc., filed a claim of lien against the project for the sum of $150,504.43. Thereupon, construction came to a standstill with the project approximately 75 per cent completed.

VII. Formation and Adoption of Completion Agreement

When construction came to a standstill in the late fall of 1953, several possibilities of action were considered. These included foreclosure, completion of the project by the surety companies, demand on Ray B. Woodbury for performance, introduc-

tion of additional money in the project in conjunction with Aleutian Homes, Inc., or in substitution of Aleutian Homes, Inc., sponsorship, or completion of the project based upon a completion agreement.

In November, 1953, demand was made on Ray B. Woodbury under his guarantee. Woodbury failed to comply with the demand.

In January, 1954, a completion agreement was formulated in substantially the form in which it became effective on April 23, 1954. The period from the end of January through April 23, 1954, was devoted to securing the necessary consent to placing the completion agreement in operation.

In general, the completion agreement provided for the completion of the construction of the project and the payment order of claimants, creditors and completion costs in four Stages. To carry out this program, Aleutian Homes, Inc., Kodiak Construction Co., and Leo S. Wynans Co., Inc., agreed to vest in a Project Manager exclusive authority to take any and all action in connection with the project that they would be authorized to take, subject to rights of HHFA defined therein.

VIII. Completion of Project

Under the completion agreement the project manager (Harry M. Langton) was appointed with certain prescribed duties and responsibilities and authority with respect to completion of the construction

and payment of the claims against the project. Similarly a construction superintendent (Scott J. Cross) was selected to take charge of the physical completion of the project. Under this arrangement, the construction of 343 houses was completed on October 26, 1954. The 344th house was not erected because the lot provided therefor was found unsuitable for building.

By April 12, 1955, 341 out of the 343 houses constructed had passed FHA final inspection. The remaining two at that time were unacceptable for reasons relating to their foundations. Under the completion agreement, all claims listed in Stages 1 and 2 were paid, while only some of the claims in Stages 3 and 4 were paid.

IX. Abandonment of Existing Long-Term Financing Commitments

The permanent individual mortgages were not taken out on any of said 341 houses and during June, 1955, the FHA commitments to insure such mortgages and the FNMA commitments to purchase such mortgages at par expired.

X. Occupancy of Project

The occupancy of the Kodiak project in terms of number of houses rented and percentage of number of houses rented to the number of houses available for each of the months commencing in 1954 is as follows:

Date	Number of Houses Available	Number of Houses Rented	Percentage of Occupancy
July, 1954	35	32	
August, 1954	203	91	
September, 1954	235	125	
October, 1954	343	142	
[From this date on.]			
November, 1954		151	
December, 1954		161	
January, 1955		168	
February, 1955		182	
March, 1955		191	
April, 1955		209	
May, 1955		219	
June, 1955		233	
July, 1955		247	72
August, 1955		256	75
September, 1955		267	78
October, 1955		281	82
November, 1955		288	85
December, 1955		294	86
January, 1956		288	85
February, 1956		291	85
March, 1956		285	84
April, 1956		295	87
May, 1956		294	86
June, 1956		285	84
July, 1956		286	84
August, 1956		288	85
September, 1956		307	91
October, 1956		318	94
November, 1956		322	95
December, 1956		318	94
January, 1957		315	93
February, 1957		313	92
March, 1957		317	93
April, 1957		306	90
May, 1957		295	87
June 20, 1957		289	85
July, 1957	342	290	86

Date	Number of Houses Available	Number of Houses Rented	Percentage of Occupancy
August, 1957		296	87
September, 1957		299	88
October, 1957		287	85
November, 1957		279	82
December, 1957		278	82
January, 1958		283	83
February, 1958		284	83
March, 1958		285	84
April, 1958		287	84
May, 1958		275	81
June, 1958		275	81
July, 1958	339	263	77
August, 1958	339	257	75
January, 1959	339	238	70
February, 1959		238	70
March, 1959		227	66
April, 1959		224	66
May, 1959		217	64
June, 1959		216	63
July, 1959		215	63
August, 1959		204	60

The Navy determined that the cost in renting and the cost of utilities to occupants of Aleutian Homes, Inc., was more than the personnel and civilian employees could pay, and increased the rental allowance to military personnel living in the Aleutian Homes project in the amount of $37.50 a month for enlisted men and $36.00 a month for officers. This occurred .....

During the summer of 1957, the Navy indicated service personnel was to be reduced by 10 per cent and civilian personnel by approximately 33⅓ per cent.

XI. Payments Made and Received by Government Agencies With Respect to Project

A. HHFA made advances to or for the benefit of Aleutian Homes, Inc., for project construction costs in the total amount of $4,192,717.10 as follows:

1. Prior to the completion agreement (from June 25, to November 24, 1953), $3,330,062.68 (out of the total authorized loan of $4,230,900).

2. Subsequent to the completion agreement, $862,654.42 to the Aleutian Homes on requisition of the Project Manager.

The difference between this total amount advanced by HHFA ($4,192,717.10) and the total loan authorized ($4,230,900) of $37,282.90 was withheld by reason of the one house not built and the two houses which by April, 1955, had not passed final FHA inspection.

In March, 1955, HHFA authorized advances in an amount not to exceed $160,000 (in addition to the original loan of $4,230,900) to be made to Aleutian Homes, Inc., to be spent for the care and preservation of its security. HHFA advanced to Aleutian Homes, Inc., on March 15, 1955, $56,239.19, which amount was repaid to HHFA on May 5, 1956, together with $3,966.01, representing 7 per cent interest on said sum from March 15, 1955, to May 5, 1956.

3. Interest under the note has been accruing at

the rate of 5 per cent. As of June 30, 1957, accrued interest claimed by HHFA to be due and unpaid was $211,105.65. As of December 31, 1959, accrued interest claimed by HHFA to be due and unpaid was $384,756.43 together with the principal balance.

B. HHFA received payments made by or on behalf of Aleutian Homes, Inc., in the total amount of $909,675.58 as follows:

1. Prior to the completion agreement (June 25, to October 31, 1953) $35,134.14.

2. After the completion agreement, from the project manager $402,241.44.

3. Immediately prior to foreclosure HHFA withdrew from bank accounts maintained by the Aleutian Homes, Inc., Project Manager an additional $122,300.

4. From the court appointed receiver $350,000.

C. FHA received fees for its commitments to insure, and extension thereof, the total sum of $22,360.

D. FNMA received fees for its commitments to purchase, and extension thereof, the sum of $106,-422.77.

XII. Rentals Received by Project Manager Prior to Foreclosure

From July 1, 1954, through June 14, 1957, the Aleutian Homes, Inc., project manager received

rentals from the project in the total amount of $1,-114,800.20, and disbursed said funds as indicated in the records he maintained of the project. Most of said funds were disbursed.

XIII. Payments Made by Plaintiff Ray B. Woodbury Subsequent to the Formulation of the Completion Agreement.

During 1954, 1955 and 1956, plaintiff paid to The Bank of California, N. A., the following sums of money on the following dates in payment of the claim of The Bank of California, N. A., as set forth in the completion agreement:

Date of Payment	Amount Paid	Credited to
Feb. 18, 1954	$ 1,083.33	Interest
June 2, 1954	1,875.00	Interest
Aug. 20, 1954	1,875.00	Interest
Dec. 6, 1954	1,895.83	Interest
May 18, 1955	3,750.00	Interest
May 18, 1955	41,455.00	Principal
May 18, 1955	14,526.43	Principal
June 13, 1955	2,352.75	Principal
July 11, 1955	2,352.75	Principal
Aug. 12, 1955	890.56	Interest
Sept. 13, 1955	285.31	Interest
Sept. 13, 1955	2,063.69	Principal
Sept. 28, 1955	658.25	Principal
Oct. 10, 1955	653.27	Interest
Oct. 10, 1955	25,591.13	Principal
June 11, 1956	787.92	Interest
July 6, 1956	1,499.58	Interest
July 6, 1956	61,000.00	Principal

During 1954, plaintiff paid Brice Mortgage Company $35,000 in settlement of all claims of Brice Mortgage Company and Brice Realty Company

against the project for alleged work done and services performed prior to the execution of the completion agreement.

During 1954, plaintiff paid $75,000 to the Administrator for use under a requirement to pay overhead under the overhead agreement and completion agreement that Ray B. Woodbury pay overhead therein described. Defendant made demands for additional overhead payments which Ray B. Woodbury did not make.

September 18, 1956, plaintiff satisfied the judgment obtained by General Casualty Company on July 24, 1956, for the unpaid premium on the bond issued on behalf of Kodiak Construction Co., together with expenses relating thereto by the payment to General Casualty Company of the sum of $33,542.09. In the defense of said action R. B. Woodbury incurred legal fees and other expenses in the sum of $2,412.93.

XIV. Foreclosure Suit

HHFA on or about June 11, 1957, in the United States District Court for the District of Alaska, Third Judicial Division, Anchorage, commenced foreclosure proceedings in the name of the United States of America against Aleutian Homes, Inc., a corporation; Pacific Alaska Contractors, Inc., a corporation; Alex B. Carlton, doing business as Carlton Lumber Company; City of Kodiak, a municipal corporation of the Territory of Alaska;

James C. Dougherty, Trustee under the Will of Hugh Dougherty; Lee Bettinger; Jack Hinckel; M. Justin Herman and David Oliver, as Trustees; Lindley R. Durkee and Melvin Frazier, as Trustees; and "Also all other persons or parties unknown claiming any right, title, estate, lien or interest in the real estate described in the complaint herein," defendants, Civil No. A-13,484.

On June 14, 1957, upon the motion of plaintiff, the court appointed M. G. Gebhart receiver of the mortgaged property until further order of the court.

On or about June 20, 1958, the court authorized the payment by the receiver to HHFA of $200,000 out of proceeds from operation of the project, and said $200,000 was paid to HHFA.

On or about September 12, 1958, plaintiff amended its complaint by adding as defendants the Territory of Alaska, Kodiak Construction Co., a corporation, Leo S. Wynans Co., Inc., a corporation, and United States of America.

On or about April 10, 1959, pursuant to request of receiver, the court authorized the payment by the receiver to HHFA of $150,000 out of proceeds from operation of the project and said $150,000 was paid to HHFA.

* * *

Plaintiff's Contentions

With respect to plaintiff's complaint

1. Plaintiff denies defendant's contentions.

2. HHFA participated in the formulation of the completion agreement dated 4/23/54 and accepted the same, under the terms of which plaintiff (a) agreed to become a standby creditor as to his then existing claims, (b) agreed to advance further substantial sums of money, and (c) agreed to relinquish any further control and direction of the project.

3. The construction and operation of the project subsequent to April 24, 1954, was under the control of HHFA, and plaintiff did in fact advance substantial funds to the project.

4. In entering into the completion agreement and in assuming control over the construction and operation of the project, HHFA and the Administrator entered into and occupied a fiduciary relationship with respect to plaintiff, Aleutian Homes, Inc., creditors and other interested parties to the completion agreement.

5. HHFA, its agents and employees, carelessly and negligently or deliberately and wilfully breached said fiduciary relationship by refusing to adopt a permanent long-range program of amortizing the Kodiak project in a manner which considered the claims of all the parties interested in the

completion agreement and instead by proceeding to satisfy and prefer its own interest as a creditor from the assets of the project to the exclusion of the interests of said other persons.

6. By reasons of said breach of fiduciary obligation, plaintiff has suffered damages in the amount of $75,000 as set forth in his first cause of action.

7. By reason of said breach of fiduciary obligation, plaintiff has suffered damages in the amount of $164,594.80 as set forth in his second cause of action.

8. By reason of said breach of fiduciary obligation, plaintiff has suffered damages in the amount of $35,955.02 as set forth in his third cause of action.

9. By reason of said breach of fiduciary obligation, plaintiff has suffered damages in the amount of $150,000 as set forth in his forth cause of action.

10. By reason of said breach of fiduciary obligation, plaintiff has suffered damages in the amount of $428,127 as set forth in this sixth cause of action.

* * *

Defendant's Contentions

I.

Defendant denies Plaintiff's Contentions.

II.

Defendant further contends:

A. That Defendant's Motion to Dismiss Plaintiff's Complaint should be granted.

B. That the complaint does not state facts to constitute a claim upon which relief can be granted.

C. That the complaint is barred by the statute of limitations, 28 U.S.C. §2401.

D. That the acts complained of in plaintiff's complaint arose in the exercise of discretionary functions and the Court has no jurisdiction thereof by reason of 28 U.S.C. §2680(a).

E. That the acts complained of may not subject defendant to damages as an interference with contract relations by reason of 28 U.S.C. §2680(h).

F. That plaintiff has failed to allege facts in his complaint giving him standing to sue.

G. That plaintiff has failed to join Aleutian Homes, Inc., an indispensable party to the action.

H. That the allegations of the complaint are not cognizable under the Federal Tort Claims Act, and the Court is therefore without jurisdiction of the subject matter of plaintiff's complaint.

I. That redemption of stock as demanded by Plaintiff's Fourth Cause of Action would be unlawful and in fraud of creditors until all debts of Aleutian Homes, Inc., including those to defendant are first paid, and if redeemed, the redemption pro-

ceeds should be paid to defendant in cash as pledgee of such shares and in accordance with the Standby Agreement dated April 27, 1953, executed by plaintiff.

J. That the present fair market value of the housing project is substantially less than the sum due and owing to defendant, and that the 799 shares of common stock in the name of Woodbury were and are pledged, assigned and delivered to defendant as security for the indebtedness of Aleutian Homes, Inc., and the obligation of Woodbury, and plaintiff has no right, title or monetary interest in the shares until the indebtedness due defendant be paid in full.

K. That the alleged agreement as set forth in the complaint, by an officer or employee of the United States with Aleutian Homes, Inc., to find, obtain and cause some third party to discharge the indebtedness of Aleutian Homes, Inc., to the United States is void and not binding upon the United States and cannot give rise to an action against the United States.

L. That the United States can be made a fiduciary only by its express consent, and no such consent has been given herein.

M. That the plaintiff, not having sought relief in the foreclosure proceedings of which he complains, the results of which alone can determine the worth of Aleutian Homes, Inc., stock, should be estopped and barred from his asserted causes of

action herein, or in the alternative the proceedings under the complaint in this action should be abated until conclusion of the proceedings in Civil A-13484, Third Judicial District of Alaska.

N. That by reason of paragraph 13 and 18 of the Completion Agreement, the Borrower's Request dated April 23, 1954, the Standby Agreement executed April 27, 1953, and by other collateral documents and writings executed by plaintiff, he is estopped to assert the action herein.

O. That the statutory authority alleged by plaintiff as a basis for suit against the Administrator of HHFA, not made a party herein, does not waive the immunity of the United States, defendant herein.

P. That insofar as plaintiff appears to rely on allegations that the Administrator or other officials of the defendant misrepresented circumstances relating to occupancy, long-term finance or other expectations or conditions, such allegations give rise to no cause of action by reason of 28 U.S.C. §2680(h).

Q. That the rights and obligations of the plaintiff were defined by the loan document, and plaintiff is bound thereby.

R. That plaintiff has failed to allege any negligent or wrongful act or omission of defendant proximate cause of the damages complained of, the defendant committed no negligent or wrongful act, and no negligent or wrongful act or omission of

defendant was the cause of the damages asserted by plaintiff.

8. That plaintiff should take nothing by reason of his complaint, and defendant should have costs and disbursements herein.

* * *

Issues

With respect to plaintiff's Complaint

1. To what extent, if any, did HHFA enter into or accept the Completion Agreement?

2. To what extent, if any, did HHFA assume control over the construction and operation of the project subsequent to April 24, 1954?

3. Under the facts and law, did HHFA and the Administrator enter into and occupy a fiduciary relationship with respect to plaintiff, Aleutian Homes, Inc., creditors and other interested parties to the Completion Agreement?

4. Did HHFA, its agents and employees, carelessly and negligently or deliberately and willfully breach said fiduciary relationship, if any?

5. As a proximate result of said breach of fiduciary obligation, if any, did plaintiff suffer damages in the amount of $75,000 or any other amount as set forth in his first cause of action?

6. As a proximate result of said breach of fiduciary obligation, if any, did plaintiff suffer dam-

ages in the amount of $164,594.80 or any other amount as set forth in his second cause of action?

7. As a proximate result of said breach of fiduciary obligation, if any, did plaintiff suffer damages in the amount of $35,955.02 or any other amount as set forth in his third cause of action?

8. As a proximate result of said breach of fiduciary obligation, if any, did plaintiff suffer damages in the amount of $150,000 or any other amount as set forth in this fourth cause of action?

9. As a proximate result of said breach of fiduciary obligation, if any, did plaintiff suffer damages in the amount of $428,127 or any other amount as set forth in his sixth cause of action?

With respect to defendant's defenses to plaintiff's Complaint

1. Should the defendant's Motion to Dismiss the complaint be allowed or denied?

2. Does the Complaint state a claim upon which relief can be granted (defendant's second defense to plaintiff's complaint)?

3. Does the Court have jurisdiction of the subject matter of the Complaint under the Federal Tort Claims Act (defendant's third defense to plaintiff's Complaint)?

4. Are the claims asserted by plaintiff barred by the statute of limitations (defendant's fourth defense to plaintiff's Complaint)?

5. Under the facts and law, is plaintiff estopped or barred from asserting the complaint herein because of failure to seek relief in the foreclosure action in Alaska?

6. Is plaintiff estopped to seek relief because of the documents and writings executed by him in evidence in this case?

7. Were the alleged acts complained of by the plaintiff relating to surrender of commitments and foreclosure discretionary functions within 28 USC §2680(a)?

8. Were the alleged acts complained of excepted from the consent given in the Federal Tort Claims Act by reason of 28 USC §2680(h)?

9. Could the defendant or the HHFA as an agent of the defendant enter into a fiduciary relationship absent its express consent?

10. Did the defendant or HHFA as an agency of the defendant enter into a fiduciary relationship to the plaintiff?

11. If defendant or HHFA as an agency of the defendant entered into a fiduciary relationship to plaintiff, did defendant or HHFA as an agency of the defendant breach such relationship?

12. If defendant or HHFA as an agency of the defendant breached a fiduciary relationship to plaintiff, was such breach, if any, the proximate cause of any damage to plaintiff?

13. Was the fair market value of the project at the time of a breach, if any, more or less than the sum of outstanding on the promissory note?

14. Is Aleutian Homes, Inc., an indispensable party to the action not joined?

* * *

Conclusion

The parties hereto agree to the foregoing Pretrial Order, and the Court being fully advised in the premises,

Now Orders that this case shall proceed before the Court without a jury, and

Orders That the defendant's Motion to Dismiss shall be segregated and first heard and that if the Complaint be not dismissed on the basis of said Motion, the Court shall proceed to try as a segregated issue the question of whether or not the United States or HHFA as an agency thereof became a fiduciary as to the plaintiff, and upon determination of said issues any remaining questions shall be tried; and it is further

Ordered that the foregoing pretrial order shall not be amended except by consent of the parties or to prevent manifest injustice; and it is further

Ordered that upon trial of this cause no proof shall be required as to matters of fact hereinabove found to be admitted, but that proof upon the issues between the plaintiff and defendant as hereinabove

stated shall be heard except insofar as said issues may be determined by the aforesaid agreed facts.

Dated at Portland, Oregon, this 15th day of July, 1960.

/s/ JOHN F. KILKENNY,
District Judge.

Approved:

KING, MILLER, ANDERSON, NASH & YERKE,

/s/ NORMAN J. WIRNER,
Of Attorneys for Plaintiff.

/s/ C. E. LUCKEY,
United States Attorney, District of Oregon, Of Attorneys for Defendant.

[Endorsed]: Filed July 15, 1960.

[Title of District Court and Cause.]

ORDER

This matter coming on now to be heard upon the defendant's motion to dismiss, or in the alternative, for a summary judgment under the provisions of Rule 12(b)(6) and Rule 56, FRCP, and the Court having considered such motion and the briefs submitted by counsel, and being now advised in the premises,

It Is Ordered that a decision on such motion be and the same is hereby reserved.

It Is Further Ordered that the issue created by the pretrial order on whether defendant was or could be a fiduciary be and the same is hereby segregated from the other issues and that a trial be held on such issue on Monday, December 12, 1960, at 9:30 a.m.

Dated this 4th day of November, 1960.

/s/ JOHN F. KILKENNY,
District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 4, 1960.

[Title of District Court and Cause.]

OPINION

Kilkenny, J:

Plaintiff claims the right to recover $853,676.82 from defendant under the Federal Tort Claims Act (Title 28, U.S.C.A. §§1346(b) and 2671 through 2680). The claim grows out of the plaintiff's interest in a housing development at Kodiak, Alaska, which development involved the plaintiff and several governmental agencies. In order to fully understand the issues, it is necessary to have a clear picture of the agencies involved.

Housing and Home Finance Agency and Housing and Home Finance Administrator (hereinafter called HHFA) was created by the Reorganization

Plan No. 3 of 1947 (61 Stat. 954, 5 U.S.C.A. §133y-16). Under this plan the various functions of the government relating to housing were consolidated within HHFA. At present, HHFA consists of five constituent agencies or units dealing with various aspects of the national housing program:

(1) Federal Housing Administration (hereinafter referred to as "FHA"), an agency created by the President pursuant to authorization by Congress, which engages in programs of mortgage insurance.

(2) Federal National Mortgage Association, a statutory corporation (hereinafter referred to as "FNMA"), which provides a secondary market for the purchase and discounting of mortgages.

(3) Urban Renewal Administration, an agency concerned with programs of urban renewal and slum clearance.

(4) Public Housing Administration, an agency which deals with programs relating to federally financed housing.

(5) Community Facilities Administration (hereinafter referred to as "CFA"), an agency which engages in a variety of programs relating to housing and community facilities not covered by the other four constituent agencies. CFA was formerly called the Community Facilities and Special Operations branch (CF&SO), but the change in its name did not affect its functions or authority. Among

the programs administered by CFA were those related to Alaska housing and prefabricated housing.

The agencies related to Urban Renewal and Public Housing had no connection with the Aleutian Homes project.

The Housing and Home Finance Administrator (hereinafter referred to as "Administrator") is the head of HHFA and is responsible for the general supervision and coordination of the statutory functions of the constituent agencies of HHFA.

The original interest of the government in prefabricated housing was contained in the Veterans Emergency Housing Act of 1946, 60 Stat. 207, Chap. 268, §12(a). The government functions relating to this program of prefabricated housing were, at that time, vested in the Reconstruction Finance Corporation, a corporation (hereinafter referred to as "RFC"). The powers of RFC which were applicable to its functions in the field of prefabricated housing were set out in 15 U.S.C.A. §603. The powers and functions of RFC which related to prefabricated housing were transferred to HHFA by Reorganization Plan No. 23 of 1950 (64 Stat. 1279; 5 U.S.C.A. §133z-15), as limited by statute. By Title 12 U.S.C. §1723(d) the functions of HHFA under Section 2 of Reorganization Plan No. 22 of 1950 were transferred to FNMA August 2, 1954.

Provisions for the making of loans for prefabricated housing were added as §102a of the Housing

Act of 1948 (62 Stat. 1268) by the Critical Defense Housing Areas Act of 1951 (65 Stat. 293; 12 U.S. C.A., Section 1701g-1).

The powers given the Housing and Home Finance Administrator with respect to prefabricated housing, set forth in 12 U.S.C.A. §1701g-2, include the following:

(A) All the powers and functions transferred to him by Reorganization Plan No. 23 of 1950.

(B) The powers, functions and duties set forth in 12 U.S.C.A. §1749a, except subsection (c)(2) thereof.

(C) The power to "take any and all actions determined by him to be necessary or desirable in making servicing, compromising, modifying, liquidating, or otherwise dealing with or realizing on loans thereunder. Such powers, functions, and duties may be exercised in the several States, the District of Columbia, and the Territories and possessions of the United States."

Included in the powers of the Administrator, set forth in §1749(a) to which reference is made in §1701g-2(B) as being applicable to the prefabricated housing program, are the following:

"(3) sue or be sued;

"(4) foreclose on any property or commence any action to protect or enforce any right conferred upon him by any law, contract, or other agreement,

and bid for and purchase at any foreclosure or any other sale any property in connection with which he has made a loan pursuant to this subchapter. In the event of any such acquisition, the Administrator may, notwithstanding any other provision of law relating to the acquisition, handling, or disposal of real property by the United States, complete, administer, remodel and convert, dispose of, lease and otherwise deal with, such property: Provided, that any such acquisition of real property shall not deprive any State or political subdivision thereof of its civil or criminal jurisdiction in and over such property or impair the civil rights under the State or local laws of the inhabitants on such property;

"(5) enter into agreements to pay annual sums in lieu of taxes to any State or local taxing authority with respect to any real property so acquired or owned;

"(6) sell or exchange at public or private sale or lease, real or personal property, and sell or exchange any securities or obligations upon such terms as he may fix;

"(7) obtain insurance against loss in connection with property and other assets held;

"(8) subject to the specific limitations in this subchapter, consent to the modification, with respect to rate of interest, time of payment of any installment of principal or interest, security, or any other term of any contract or agreement to

which he is a party or which has been transferred to him pursuant to this subchapter; and;

"(9) include in any contract or instrument made pursuant to this subchapter such other covenants, conditions, or provisions as he may deem necessary to assure that the purposes of this subchapter will be achieved."

The Independent Offices Appropriation Act of 1955 passed on June 24, 1954, as Ch. 359, 68 Stat. 272 (83rd Cong. 2d Sess., Public Law 428) established as of June 30, 1954, a revolving fund with which the Administrator could account for all assets and liabilities in connection with various programs, including:

"* * * functions transferred under Reorganization Plan No. 23 of 1950 (5 U.S.C. 133z-15, note), or authorized under Sections 102, 102a, 102b, and 102c of the Housing Act of 1948, as amended (12 U.S.C. 1701g-1701g-3 [Prefabricated Housing Program]); * * * notes or other obligations purchased pursuant to the Alaska Housing Act, as amended (48 U.S.C. 484(a)); * * *"

It was further provided:

"That said fund shall be available for all necessary expenses (including administrative expenses) in connection with the liquidation of the programs carried out pursuant to the foregoing provisions of law, including operation, maintenance, improvement, or disposition of facilities, and for disburse-

ments pursuant to outstanding commitments against moneys herein authorized to be credited to said fund, repayment of obligations to the Treasury, and refinancing and refunding operations on existing loans * * *"

After non-payment of its note, the Aleutian Homes, Inc., project was included in the liquidating program administered by HHFA under the revolving fund established by this Act.

FHA was established in 1934 with powers as codified in 12 U.S.C.A., §1702. It was transferred as a constituent agency to HHFA by Reorganization Plan No. 3 of 1947 (61 Stat. 954, 5 U.S.C.A., §133y-16). The powers to insure conventional mortgages on individual houses are contained in Title II, Section 203, of the National Housing Act of 1934 (48 Stat. 1248, Chapter 847, 12 U.S.C.A. §1709). That section was amended by the Housing Act of 1954 (68 Stat. 591) to change the value ratio of loans which FHA is authorized to insure thereunder.

Under the provisions of the Alaska Housing Act, FHA was given authority to insure mortgages in Alaska in a dollar amount up to 50 per cent higher than its authority with respect to mortgages on property located in the United States. Further it gave FHA authority to insure mortgages in Alaska without the requirement, applicable to housing in the states, that the commissioner find the project to be economically sound or an acceptable risk (63 Stat. 57, 65 Stat. 315, 12 U.S.C.A., §1715d).

The creation of FNMA and the establishment of its powers is set out in 12 U.S.C.A. §§1716 through 1723d.

FNMA was transferred from the jurisdiction of RFC to HHFA to be "administered subject to the direction and control" of HHFA by Reorganization Plan No. 22 of 1950 (64 Stat. 1277, 5 U.S.C.A., §133z-15, as limited by statute. By Title 12 U.S.C. §1723(d) the functions of HHFA under Section 2 of Reorganization Plan No. 22 of 1950 were transferred to FNMA August 2, 1954.

Likewise, it is necessary to know the names of the non-Federal government agencies and private organizations involved or in some way connected. They are:

A. Alaska Housing Authority. Agency of the Territory of Alaska concerned with housing problems in Alaska.

B. City of Kodiak, Alaska. The city through its officials, principally Mayor Lee C. Bettinger, took active interest in promoting a housing project for the City under private sponsors, and provided tax concessions for streets and other support for the project.

C. Hubbell and Waller. An engineering firm cooperating with the City for soil tests, street layout, etc.

D. Ray Lewis and associates. A firm which negotiated with the City with view to sponsoring construction of project.

E. Pacific Structures, Inc. A firm in Portland, Oregon, in which R. B. Woodbury and others were interested which planned to produce prefabricated houses.

F. Aleutian Homes, Inc. An Oregon corporation formed by R. B. Woodbury as President and principal stockholder to sponsor the Aleutian Homes project and become the owner thereof.

G. Brice Mortgage Co., and Brice Realty Co. Portland, Oregon, mortgage brokers and realty firms. Brice Mortgage Co. agreed with Aleutian Homes, Inc., to arrange permanent financing for the project as mortgagee under a proposed loan for FHA insured mortgages and sale of the mortgages to FNMA. Brice applied for and received commitments from FHA to insure and FNMA to purchase the mortgages on stated conditions.

H. Kodiak Construction Co. An Oregon corporation organzied with R. B. Woodbury as President for the purpose of being the General Contractor for the construction of the project.

I. Pacific-Alaska Contractors, Inc. A Washington corporation which had a sub-contract from Kodiak Construction Co., for site preparation and foundations.

J. Carlton Lumber Co. A firm owned by A. B. Carlton which had a sub-contract from Kodiak to furnish the prefabricated house packages.

K. Leo S. Wynans Co., Inc. An Oregon corporation having a sub-contract from Kodiak to erect the houses on-site.

L. Coastwise Steamship Lines. Had agreement to transport houses from Portland, Oregon, to Kodiak, Alaska.

M. North Pacific Supply Co. A partnership at Portland, Oregon, in which R. B. Woodbury, Fred Miller and Jack Crawford were partners, as electrical equipment wholesalers.

N. Columbia Supply Co. A partnership at Swan Island, Portland, Oregon, composed of R. B. Woodbury and Lucille Woodbury, his wife.

O. Smith Q McMenamin. A Portland, Oregon, accounting firm employed by Woodbury as accountants on behalf of Columbia Supply Co., Aleutian Homes, Inc., and Kodiak Construction Co.

P. General Casualty Co. A bonding company providing performance bond as surety for general contract performance by Kodiak Construction Co.

Q. United States Fidelity & Guaranty Co. A bonding company providing performance bond as surety for site improvement contract of Pacific-Alaska Contractors, Inc.

R. United National Indemnity Co. and The Fidelity & Casualty Co. of New York. Bonding companies providing performance bond as sureties on the house package contract of Alex B. Carlton.

S. United Pacific Insurance Co. Bonding company providing performance bond for construction contract of Leo S. Wynans, Inc.

Commencing in 1949, the possibility of securing additional housing for naval and civilian personnel connected with the Kodiak Naval Base in Alaska was discussed among Navy officials, officials of the Alaska Housing Authority, officials of the City of Kodiak and officials of FHA. The possibility of securing housing under the Wherry Act (Title VIII of the National Housing Act, as amended) was considered and rejected and studies were then made with respect to the possibility of construction of an off-base project of some 350 to 400 houses using conventional FHA assistance under Title II, Section 203, of the National Housing Act, as amended.

During 1950-1951, arrangements were made to secure, as a site for this project, certain land belonging to the federal government under the control of the Bureau of Land Management of the Department of Interior. Arrangements were made to transfer this land to the Alaska Housing Authority for reconveyance to the City of Kodiak for use for a project to be built by a sponsor selected by the City of Kodiak. Subsequently, in accordance with law, the Alaska Housing Authority conveyed the land directly to the approved sponsor. It was determined that the City of Kodiak would provide streets, the city and Department of Interior through Alaska Public Works would provide water and sewer facilities and schools and the local REA

would provide power. During 1951, the City of Kodiak received a commitment from the Alaska Public Works program for money to construct the sewer and water facilities in connection with the proposed project.

During 1950 and 1951 considerable surveying of the site and engineering was carried on on behalf of the City of Kodiak and a Raymond Lewis of Los Angeles who was a proposed sponsor for the project. In late 1951, Mr. Lewis abandoned interest in sponsorship of the propsed project.

During 1951, plaintiff became interested in the promotion of a house panel invented by an architect, S. C. Horsley. In late 1951, plaintiff financed a trip by Horsley, R. A. Blanchard and G. K. Gosling to Alaska to investigate the possibility of selling the Horsley panel for use in houses in Alaska. In the course of this promotion, Lee C. Bettinger, the Mayor of Kodiak, was contacted by Gosling and commenced to interest plaintiff to become sponsor of the proposed project in the place of Raymond Lewis.

In February, 1952, Aleutian Homes, Inc., was incorporated under the laws of the state of Oregon and in February or March, 1952, the City of Kodiak approved Aleutian Homes, Inc., as the sponsor of the proposed housing project. Thereafter, the Alaska Housing Authority conveyed the land selected for the site to Aleutian Homes, Inc.

The proposed projejct was intended to be financed under the provisions of Title II, Section 203, of the National Housing Act, as amended. Under this program, a private mortgage agency takes out individual long-term mortgages on each house included in the project. With respect to the Kodiak project, Brice Mortgage Company was selected to act as the permanent mortgagee.

In order to enable Brice Mortgage Company to sell the mortgages which it intended to obtain on each of the houses in the project, it was necessary for Brice Mortgage Company to obtain a commitment from FHA to insure said mortgages. In accordance with FHA requirements with respect to the insurance of a project located in Kodiak, Alaska, the Secretary of Navy in 1951, with respect to Raymond Lewis and again in 1952 with respect to Aleutian Homes, Inc., certified to FHA (1) the critical urgent need of the Navy for 385 family units for use by military and civilian personnel at the Kodiak Naval Base, (2) the permanency of the Kodiak Naval Base, and (3) the ability of such military and civilian personnel to pay rentals for such units in the amount of $100, $130 and $150 for small two, large two and three bedroom units, including garage and kitchen equipment. In 1952, FHA appraised the value of a 344 unit project at $5,904,250 and in April 1952, issued for a stated period its conditional commitment to Brice Mortgage Company to insure long-range individual mortgages on each home in a total amount of

$4,706,400, which amount was based on 80 per cent of the FHA appraised value.

Also in 1952, FNMA issued its commitment to Brice Mortgage Company to purchase at par the individual long-range mortgages as they were obtained by Brice Mortgage Company and insured by FHA.

The $4,706,400 to be received from the long-term financing was to be used by Aleutian Homes, Inc., for (1) repayment of the construction loan from HHFA, $4,230,900; (2) payment of costs of taking out the permanent individual mortgages; and (3) any balance remaining as capital.

During 1952, Aleutian Homes, Inc., and Brice Mortgage Company found it impossible to secure from private sources the financing required for the construction of the project prior to the obtaining of the long-range financing as set forth above, and sought assistance from HHFA. In said year, negotiations were had between Brice Mortgage Company, acting on behalf of Aleutian Homes, Inc., and the Community Facilities and Special Operations Branch of HHFA for the purpose of securing an interim loan for construction purposes. A final application was made by Aleutian Homes, Inc., late in 1952 and approved in January, 1953. This interim construction loan by HHFA was in the sum of $4,230,900, which constituted 90 per cent of the amount of the FHA and FNMA commitments with respect to the permanent long-range financing, the

application indicating the difference between the projected costs and the loan amount applied for would be provided for by the Sponsor, Aleutian Homes, Inc. The loan was authorized by a Loan Authorization signed by the Administrator, and carried into effect by documents required by a Building Loan Agreement, including a guaranty of the Loan Agreement and the guaranty of the construction contract by R. B. Woodbury, and a promissory note and deed of trust. Procedures for disbursement under the loan were provided for in a Loan and Disbursement Agreement executed by R. B. Woodbury as President, Aleutian Homes, Inc., April 27, 1953. The construction contracts and stock of Aleutian Homes, Inc., were assigned to the Administrator. A Standby Agreement was executed by R. B. Woodbury, President, Aleutian Homes, Inc., and R. B. Woodbury, individually. Performance bonds run to Aleutian Homes, Inc., and the Administrator.

Contractual arrangements for the construction of the project under the interim loan from HHFA were signed in Seattle, Washington, on April 27, 1953. In general they provided as follows: Aleutian Homes, Inc., as the owner entered into a "general contract" with Kodiak Construction Co. for the construction of the housing project for the payment of the sum of $4,230,900 (the total maximum amount of the HHFA loan). Kodiak Construction Co., as general contractor, in turn contracted with three subcontractors, plus a freight company, the

total payment under which subcontracts, plus freight, similarly equaled the sum of $4,230,900, (the maximum total amount of the HHFA loan). These subcontracts were as follows:

1. A "supply contract" entered into with Alex B. Carlton, doing business as Carlton Lumber Company, for the purchase of the prefabricated housing packages.

2. A "site construction contract" entered into with Pacific Alaska Contractors, Inc., for preparation of the site.

3. A "construction contract" entered into with Leo S. Wynans Co., Inc., for the erection of the prefabricated houses on the prepared sites.

4. A contract with Coastwise Line for the transportation of prefabricated house packages and other materials from Portland, Oregon, to Kodiak, Alaska.

During the summer of 1953, certain difficulties arose in the preparation of the site and a controversy developed between Kodiak Construction Co., speaking through Leo S. Wynans, its agent, and Pacific Alaska Contractors, Inc. At the time of this controversy Pacific Alaska Contractors, Inc., ceased further work on the site preparation and Kodiak Construction Co., under the direction of Wynans, proceeded to furnish labor and materials required under the site construction contract.

In October and November, 1953, financial difficulties arose in connection with the construction of

the project, and, on November 6, 1953, Pacific Alaska Contractors, Inc., filed a claim of lien against the project for the sum of $150,504.43. Thereupon, construction came to a standstill with the project approximately 75 per cent completed.

When construction came to a standstill in the late fall of 1953, several possibilities of action were considered. These included foreclosure, completion of the project by the surety companies, demand on Ray B. Woodbury for performance, introduction of additional money in the project in conjunction with Aleutian Homes, Inc., or in substitution of Aleutian Homes, Inc., sponsorship, or completion of the project based upon a completion agreement. In November, 1953, demand was made on Ray B. Woodbury under his guarantee. Woodbury failed to comply with the demand. In January, 1954, a completion agreement[1] was formulated in substantially the form in which it became effective on April 23, 1954. The period from the end of January through April 23, 1954, was devoted to securing the necessary consent to placing the completion agreement in operation. In general, the completion agreement provided for the completion of the construction of the project and the payment order of claimants, creditors and completion costs in four stages. To carry out this program, Aleutian Homes, Inc., Kodiak Construction Co. and Leo S. Wynans Co., Inc., agreed to vest in a Project Manager exclusive authority to take any and all action in connection

[1]See Appendix A.

with the project that they would be authorized to take, subject to the rights of HHFA defined therein.

Under the completion agreement the project manager (Harry M. Langton) was appointed with certain prescribed duties and responsibilities and authority with respect to completion of the construction and payment of the claims against the project. Similarly a construction superintendent (Scott J. Cross) was selected to take charge of the physical completion of the project. Under this arrangement, the construction of 343 houses was completed on October 26, 1954. The 344th house was not erected because the lot provided therefor was found unsuitable for building.

By April 12, 1955, 341 out of the 343 houses constructed had passed FHA final inspection. The remaining two at that time were unacceptable for reasons relating to their foundations. Under the completion agreement, all claims listed in Stages 1 and 2 were paid, while only some of the claims in Stages 3 and 4 were paid.

The permanent individual mortgages were not taken out on any of said 341 houses and during June, 1955, the FHA commitments to insure such mortgages and the FNMA commitments to purchase such mortgages at par expired.

The Navy determined that the cost in renting and the cost of utilities to occupants of Aleutian Homes, Inc., was more than the personnel and civilian employees could pay, and increased the rental allow-

ance to military personnel living in the Aleutian Homes project in the amount of $37.50 a month for enlisted men and $36.00 a month for officers.

During the summer of 1957, the Navy indicated service personnel was to be reduced by 10 per cent and civilian personnel by approximately 33⅓ per cent.

HHFA made advances to or for the benefit of Aleutian Homes, Inc., for project construction costs in the total amount of $4,192,717.10 as follows:

1. Prior to the completion agreement (from June 25 to November 24, 1953) $3,330,062.68 (out of the total authorized loan of $4,230,900).

2. Subsequent to the completion agreement, $862,654.42 to the Aleutian Homes on requisition of the Project Manager. The difference between this total amount advanced by HHFA ($4,192,717.10) and the total loan authorized ($4,230,900) of $37,-282.90 was withheld by reason of the one house not built and the two houses which by April, 1955, had not passed final FHA inspection.

In March, 1955, HHFA authorized advances in an amount not to exceed $160,000 (in addition to the original loan of $4,230,900) to be made to Aleutian Homes, Inc., to be spent for the care and preservation of its security. HHFA advanced to Aleutian Homes, Inc., on March 15, 1955, $56,239.19, which amount was repaid to HHFA on May 5, 1956, together with $3,966.01, representing 7 per cent

interest on said sum from March 15, 1955, to May 5, 1956.

3. Interest under the note has been accruing at the rate of 5 per cent. As of June 30, 1957, accrued interest claimed by HHFA to be due and unpaid was $211,105.65. As of December 31, 1959, accrued interest claimed by HHFA to be due and unpaid was $384,756.43, together with the principal balance.

HHFA received payments made by or on behalf of Aleutian Homes, Inc., in the total amount of $909,675.58 as follows:

1. Prior to the completion agreement (June 25 to October 31, 1953) $35,134.14.

2. After the completion agreement, from the project manager, $402,241.44.

3. Immediately prior to foreclosure HHFA withdrew from bank accounts maintained by the Aleutian Homes, Inc., Project Manager an additional $122,300.

4. From the court appointed receiver, $350,000.

FHA received fees for its commitments to insure, and extension thereof, the total sum of $22,360.

FNMA received fees for its commitments to purchase, and extension thereof, the sum of $106,422.77.

From July 1, 1954, through June 14, 1957, the Aleutian Homes, Inc., project manager received rentals from the project in the total amount of

$1,114,800.20, and disbursed said funds as indicated in the records he maintained of the project. Most of said funds were disbursed.

During 1954, 1955 and 1956, plaintiff paid to The Bank of California, N.A., the following sums of money on the following dates in payment of the claim of the Bank of California, N.A., as set forth in the completion agreement:

Date of Payment	Amount Paid	Credited to
Feb. 18, 1954	$ 1,083.33	Interest
June 2, 1954	1,875.00	Interest
Aug. 20, 1954	1,875.00	Interest
Dec. 6, 1954	1,895.83	Interest
May 18, 1955	3,750.00	Interest
May 18, 1955	41,455.00	Principal
May 18, 1955	14,526.43	Principal
June 13, 1955	2,352.75	Principal
July 11, 1955	2,352.75	Principal
Aug. 12, 1955	890.56	Interest
Sept. 13, 1955	285.31	Interest
Sept. 13, 1955	2,063.69	Principal
Sept. 28, 1955	658.25	Principal
Oct. 10, 1955	653.27	Interest
Oct. 10, 1955	25,591.13	Principal
June 11, 1956	787.92	Interest
July 6, 1956	1,499.58	Interest
July 6, 1956	61,000.00	Principal

During 1954, plaintiff paid Brice Mortgage Company $35,000 in settlement of all claims of Brice Mortgage Company and Brice Realty Company against the project for alleged work done and service performed prior to the execution of the completion agreement.

During 1954, plaintiff paid $75,000 to the Administrator for use under a requirement to pay overhead under the overhead agreement and completion agreement that Ray B. Woodbury pay overhead therein described. Defendant made demands for additional overhead payments which Ray B. Woodbury did not make.

On September 18, 1956, plaintiff satisfied the judgment obtained by General Casualty Company on July 24, 1956, for the unpaid premium on the bond issued on behalf of Kodiak Construction Co., together with expenses relating thereto by the payment to General Casualty Company of the sum of $33,542.09. In the defense of said action R. B. Woodbury incurred legal fees and other expenses in the sum of $2,412.93.

HHFA on or about June 11, 1957, in the United States District Court for the District of Alaska, Third Judicial Division, Anchorage, commenced foreclosure proceedings in the name of the United States of America against Aleutian Homes, Inc., a corporation; Pacific Alaska Contractors, Inc., a corporation; Alex B. Carlton, doing business as Carlton Lumber Company; City of Kodiak, a municipal corporation of the Territory of Alaska; James C. Dougherty, Trustee under the Will of Hugh Dougherty; Lee Bettinger, Jack Hinckel, M. Justin Herman and David Oliver, as Trustees; Lindley R. Durkee and Melvin Frazier, as Trustees, and "Also all other persons or parties unknown claiming any right, title, estate, lien or interest

in the real estate described in the complaint herein," defendants, Civil No. A-13,484. On June 14, 1957, upon the motion of plaintiff, the court appointed M. G. Gebhart receiver of the mortgaged property until further order of the court. On or about June 20, 1958, the Court authorized the payment by the receiver to HHFA of $200,000 out of proceeds from operation of the project, and said $200,000 was paid to HHFA. On or about September 12, 1958, plaintiff amended its complaint by adding as defendants the Territory of Alaska, Kodiak Construction Co., a corporation; Leo S. Wynans Co., Inc., a corporation, and United States of America. On or about April 10, 1959, pursuant to request of the receiver, the Court authorized the payment by the receiver to HHFA of $150,000 out of proceeds from operation of the project and said $150,000 was paid to HHFA.

Plaintiff's Contentions

Generally speaking, the plaintiff's contentions are:

1. That HHFA participated in the formulation of the completion agreement dated 4/23/54 and accepted the same, under the terms of which plaintiff, (a) agreed to become a standby creditor as to his then existing claims, (b) agreed to advance further substantial sums of money, and (c) agreed to relinquish any further control and direction of the project.

2. That the construction and operation of the project subsequent to April 24, 1954, was under the control of HHFA, and plaintiff did in fact advance substantial funds to the project.

3. That in entering into the completion agreement and in assuming control over the construction and operation of the project, HHFA and the Administrator entered into and occupied a fiduciary relationship with respect to plaintiff, Aleutian Homes, Inc., creditors and other interested parties to the completion agreement.

4. That HHFA, its agents and employees, carelessly and negligently or deliberately and wilfully breached said fiduciary relationship by refusing to adopt a permanent long-range program of amortizing the Kodiak project in a manner which considered the claims of all the parties interested in the completion agreement and instead by proceeding to satisfy and prefer its own interests as a creditor from the assets of the project to the exclusion of the interests of said other persons.

5. That by reason of the alleged breaches of the alleged fiduciary obligation plaintiff was damaged in a substantial sum.

Defendant's Contentions

That the Federal Tort Claims Act (Title 28, U. S. C. A. §1346(b) and §§2671 through 2680) is not applicable to the factual situation in this case and, consequently, the Court has no jurisdiction to proceed, in that:

(a) The alleged breach of duty is not a "negligent or wrongful act or omission" under the Tort Claims Act; and

(b) The acts of which plaintiff complains were in the exercise of a discretionary function and therefore not actionable under the express terms of the exceptions of the Tort Claims Act, Title 28, U. S. C. A. §2680.

In view of my ultimate decision, it is not necessary to mention other points raised by defendant.

The testimony is clear and convincing that the defendant, acting by and through the Navy Department, was vitally interested in the construction of housing for Navy personnel at Kodiak. Likewise, the testimony clearly shows that plaintiff, through his corporations and individually, was interested in the construction from an investment viewpoint. All parties entered into the original agreements in entire good faith.

After Brice Mortgage Company was unable to arrange for long-term financing, it became a certainty that such financing could be obtained only through defendant's agencies. In my opinion the evidence is conclusive that no housing project would ever have been commenced at Kodiak if long-term financing had not been contemplated by defendant's agencies. If there ever was any doubt on the subject of long-term financing, that doubt was removed when financial difficulties arose and construction ground to a halt in the fall of 1953.

A large scale housing project in Kodiak, Alaska, such as here contemplated, could not be successful unless supported by Navy personnel. That the Navy

was vitally interested is clearly shown by the certificate of the Secretary of the Navy made in 1952 in which he certified to FHA the critical need of the Navy for 385 family units for use by military and civilian personnel at Kodiak Naval Base, the permanency of the Kodiak Naval Base and the ability of such military and civilian personnel to pay rentals as indicated on page 10 of this Opinion. Defendant was even more deeply involved in October and November, 1953, when certain liens were filed against the project. Construction came to a standstill when the project was approximately 75 per cent complete. Prior to the signing of the completion agreement, defendant, through HHFA, advanced $3,330,062.28 on the project. When we look at this agreement in light of the huge investment in the project then held by defendant, we can readily understand why defendant's agency wanted absolute control removed from the hands of plaintiff and his organizations and placed in the hands of defendant's agency.

The evidence is undisputed that HHFA played a major part in all of the negotiations leading up to the signing of the completion agreement on April 23, 1954. Certainly, defendant's agency is not to be criticized for attempting to save an investment of approximately three and one third million dollars. If the project was not completed, the investment would be worthless. In my opinion this agency, under the facts then existing and under the powers granted by Congress, had full right and authority

to complete the project, if it so desired. All parties concluded that it was for the best interests of everyone concerned to proceed with the construction under the direction of a Project Manager. It is true that neither HHFA nor the Administrator signed the completion agreement. However, it is crystal clear that all parties to the agreement anticipated that HHFA would formally accept such obligations as it had under the terms of this agreement. I am not attempting to distinguish between HHFA and the Administrator. The agreement refers to the Administrator as the "Lender," and he will be herein referred to as "Lender." Under its terms certain promises were made in order to induce Lender to disburse further proceeds of the loan. The parties agreed to sign all documents required by the Lender. All income from the project and other proceeds were to be assigned to the Lender. Plaintiff agreed to provide certain overhead expenses required by the Lender estimated at $16,000 per month. The Project Manager had to be acceptable to the Lender and was vested with full and exclusive authority to take all action necessary in connection with the project, subject to the general direction of the Lender. Any and all subcontractors had to be approved by the Lender. The Project Manager was subject to removal on the request of the Lender. In truth and in fact, the Lender had an absolute right to designate the Project Manager and discharge him if Lender so desired. The bank account from which disbursements were made for the completion of the project was in the name of

the Lender and the Project Manager. In other words, when the funds were disbursed by the Lender under its commitments, such funds were transferred to a bank account over which the Lender had absolute control. The construction superintendent had to be acceptable to the Lender and was subject only to the direction of the Project Manager and, by inference, subject to removal only by the Project Manager.

The language in paragraph 18 of the agreement indicates that the only reason it was not signed by HHFA or the Administrator (Lender) was a doubt as to whether the law authorized such execution. The agreement did require written or oral approval by the Lender. The Lender gave written approval of the agreement. Outside of the terms and provisions of the completion agreement the evidence is overwhelming that the Lender in truth and in fact took over absolute control of and proceeded with the completion of the project.

In my opinion the fact that the completion agreement was not signed by Lender is of no significance. Contractual liability under a written contract may be assumed without signing it. Girard Life Insurance & Trust Co. vs. Cooper, 162 U.S. 529; Laurent vs. Anderson, 6 Cir., 1934, 70 F.2d 819; First National Bank vs. Sleeper, 8 Cir., 1926, 12 F.2d 228; Commercial Standard Insurance Co. vs. Garrett, 10 Cir., 1934, 70 F.2d 969. In fact, the Lender in this case accepted the completion agreement in writing. The validity and construction of contracts through

which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties and the titles or liens which they create or permit present questions of federal law not controlled by the laws of any state. United States vs. Allegheny County, 322 U.S. 174, 182; S.R.A., Inc. vs. Minnesota, 327 U.S. 558, 564; United States vs. Jones, 9 Cir., 1949, 176 F.2d 278.

Defendant argues that under well established legal principles defendant cannot occupy the position of a fiduciary. Restatement of the Law, Trusts 2d, §95; United States vs. Waylyn Corp., D.P.R., 1955, 130 F. Supp. 783, aff'd Waylyn Corp. vs. United States, 1 Cir., 1956, 231 F.2d 544, cert. den. 352 U.S. 827. Those authorities are not in point. Lender was delegated broad general powers by the Congress to go forward with prefabricated housing and in particular with housing in Alaska. 15 U. S. C. A. §603; 12 U. S. C. A. §1749(a); 12 U. S. C. A. §1701g-(2); Federal Housing Administrator vs. Burr, 1939, 309 U.S. 242.

If the United States Government, or any branch thereof, enters into a contract with an individual, natural or corporate, and does so in its private or business capacity and not as a sovereign, it submits itself to the same rules of law which govern the construction of contracts between individuals. S.R.A., Inc. vs. Minnesota, supra; Reading Steel Casting Co. vs. United States, 268 U.S. 186; Lynch vs. United States, 292 U.S. 571. In a case such as this, where the governmental agency is acting in a

commercial field, with the full authority and consent of Congress, that agency should not be less amenable to the ordinary rules of law than would be a private enterprise under like circumstances. Keifer & Keifer vs. Reconstruction Finance Corp., 1938, 306 U.S. 381; Federal Housing Administrator vs. Burr, supra.

Defendant forcefully argues that United States vs. Waylyn Corp., supra, is authority for its proposition that defendant could not be a fiduciary under the circumstances of this case. In that case the United States instituted a suit to foreclose a loan. Defendant corporation counterclaimed for damages on a theory that the United States breached a certain fiduciary relationship in not doing certain things to enable defendant's apartment buildings to become self-supporting and self-liquidating. Plaintiff's motion to dismiss the counterclaim was allowed. The Court, in passing on the coverage of the counterclaim under the Federal Tort Claims Act, stated that the acts complained of and on which the counterclaim was based were obviously an exercise of a discretionary function and would fall within the exception contained in §2280(a). The case does not hold that the government cannot occupy a fiduciary relationship.

I am of the opinion that the Lender could legally occupy the legal status of a fiduciary in connection with the completion of the housing project in question. Furthermore, I find and hold that the Lender took over full and complete control of such project

and, in so doing, was acting in a fiduciary capacity with the plaintiff. A more detailed statement of the evidence in support of this conclusion is neither necessary nor desirable.

The completion agreement was accepted by the Lender by letter dated April 27, 1954. The identical resolutions of Kodiak Construction Co. and Aleutian Homes each authorizing the signing of the completion agreement also turned complete control of the project over to a Project Manager who had to be acceptable to the Lender. The Lender designated the Manager's powers, duties, compensation and tenure. The same sort of an arrangement was made by resolution of each corporation in connection with the appointment of a Construction Superintendent acceptable to Lender. The Lender had full charge and control of the powers, duties, compensation and tenure of such Superintendent. In part the resolution read:

"* * *

"Now, Therefore, in order to indice Lender to accept Completion Agreement and in order to comply with the provisions thereof, this corporation does hereby:

"* * *

"2. Authorize the employment and appointment of a 'Project Manager' sho shall be vested with full and complete authority to do every act and thing which this corporation could do by its regularly

elected directors and officers in connection with any manner or thing connected with said Project, and this corporation does further authorize the officers of this corporation to appoint such person and any successor thereto as may be acceptable to Lender to enter into an agreement with such person or persons designating his powers, duties, compensation and tenure, such agreement to be in accordance with the terms and conditions of such Completion Agreement and subject to the approval of the Lender;

"* * *"

It is clear from all pertinent parts and provisions of the completion agreement, taken together and considered in light of the facts and circumstances surrounding the transaction at the time of execution, and the actions of the parties subsequent thereto, that the obligation of the Lender to furnish long-term financing was within the contemplation of the parties and was necessary to carry their intentions into effect. In such case the obligation will be implied and enforced. Stern vs. Dunlap Co., 10 Cir., 1955, 228 F.2d 939; Northeast Clackamas County Electric Co-op vs. Continental Casualty Co., 9 Cir., 1955, 221 F.2d 329; Sacramento Navigation Co vs. Salz, 273 U.S. 326; Hudson Canal Co. vs. Pennsylvania Coal Co., 75 U.S. 276.

A person in a fiduciary relation to another is under a duty to act for the benefit of the other as to matters within the scope of the relation. Such

relation is defined in Black's Law Dictionary, 4th Ed., 753; Farrow vs. Dermott Drainage District, 8 Cir., 1944, 139 F.2d 800, 805:

"A relation subsisting between two persons in regard to a business, contract, or piece of property, * * * of such a character that each must repose trust and confidence in the other and must exercise a corresponding degree of fairness and good faith. Out of such a relation, the law raises the rule that neither party may * * * take selfish advantage of his trust, or deal with the subject-matter of the trust in such a way as to benefit himself or prejudice the other except in the exercise of the utmost good faith and with the full knowledge and consent of that other."

Already I have mentioned that the only source of long-term financing in the area was through the federal loan agencies. In my opinion an agreement to provide such long-term financing was as much a part of the completion agreement as if it had been specifically mentioned. The providing of such financing was one of the duties of the Lender when it moved in and took complete control of the project. The Lender did not provide this long-term financing. On the other hand, it commenced foreclosure proceedings.

Likewise, the fact that the completion of the project required a larger expenditure of funds than was anticipated at the time of execution of the completion agreement is something which must have been within the contemplation of the parties and

an implied agreement on the part of the Lender should be read into the contract to provide long-term financing for such additional funds.

Whether the Lender, under the evidence in the case, was justified in refusing to go forward with the long-term financing is a question which I need not decide. I have already concluded that defendant could act as a fiduciary and was acting in a fiduciary or confidential capacity in assuming control over the completion of the project and the long-term financing. Assuming, arguendo, and I would so hold if I felt I had jurisdiction, that defendant in truth and in fact breached its duty in failing to provide, without justification, said long-term financing, is such breach of duty "negligent or wrongful act or omission" within the meaning of the phrase as used in the Federal Tort Claims Act?

I now approach the vital question of jurisdiction under the Tort Claims Act. The hearings before the Committee on the Judiciary, House of Representatives, 77th Cong., 2d Sess. on the pending Tort Claims Act quite conclusively show that Congress did not contemplate waiver of the government's immunity for all tortious conduct.[2] Mr. Justice

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[2]Statement to the Committee by Francis M. Shea:
"If enacted, H.R. 6463 would broaden the existing authority to make administrative adjustment of tort claims, extending it to include claims for personal injury and death as well as for property loss or damage. It would also remove an existing inequality in our law which permits suit to be brought against the United States for certain types of tort claims,

Reed, author of the opinion in the important case of Dalehite vs. United States, 346 U.S. 15, in commenting on this legislative history, said:

"* * * Uppermost in the collective mind of Congress were the ordinary common-law torts. Of these, the example which is reiterated in the course of the repeated proposals for submitting the United States to tort liability is 'negligence in the operation of vehicles'. * * *"

Assuming that the violation of a duty imposed by the fiduciary relationship created in this case is tortious conduct, Restatement of the Law, Torts, §874; Harper vs. Interstate Brewery Co. (1942), 168 Or. 26, 120 P. 2d 757, does such violation fall

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such as admiralty and maritime torts, and yet precludes suit on the ordinary common-law type of tort, such as personal injuries or property damage resulting from negligent operation of an automobile. * * *

"* * *

"The past 85 years have thus witnessed a steady encroachment upon the doctrine of sovereign immunity. Yet there remains a large and important category of wrongs for which there is as yet no satisfactory remedy—the ordinary common-law type of torts, such as personal injury or property damage caused by negligent operation of an automobile by a government employee in the course of his employment. * * *

"* * * It is neither desirable nor intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act should be tested through the

within the provisions of the Tort Claims Act? I think not. The Restatement, in Chap. 43, classifies the violation of a fiduciary duty as tortious under rules applicable to certain types of conduct. Negligence is treated in an entirely separate and distinct volume of such work. In construing the Tort Claims Act the courts have uniformly held that immunity was not waived as to all torts. Immunity was not waived for conduct amounting to a nuisance. Dalehite vs. United States, supra. The Act does not impose absolute liability for the ownership and operation of a dangerous instrumentality. United States vs. Ure, 9 Cir., 1955, 225 F.2d 709; Porter vs. United States, 128 F. Supp, 590, aff'd 228 F.2d 389. The

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medium of a damage suit for tort. The same holds true of other administrative action not of a regulatory nature, such as the expenditure of Federal funds, the execution of a federal project, and the like." * * *

"* * *

"Memorandum for use of the Committee on the Judiciary:

"The survival of government irresponsibility in the field of common-law torts is an anachronism, founded upon no sounder reason than a historical prejudice against tort claims. No acceptable justification has ever been cited for this immunity and in an area of steadily growing government activity, involving considerable use of automobiles and other mechanical equipment capable of causing damage to person and property, the absence of a satisfactory procedure for redressing such wrongs becomes a grave defect in our social policy." (Emphasis added.)

act does not impose liability without fault. Harris vs. United States, 10 Cir., 1953, 205 F.2d 765. Although fraud and deceit may constitute tortious conduct, such conduct does not fall within the provisions of the Act. United States vs. Gill, (1957) W.D. Pa., 156 F. Supp. 955. The courts, by inference, in construing the language "negligent or wrongful act or omission" have applied the well-known rule of ejusdem generis. Under this rule the general words in a statute (or wrongful act or omission) are confined to the class which it has specifically described (negligent) and may not be used to enlarge the meaning of such word. Cleveland vs. United States, 329 U.S. 14; Fourco Glass Co vs. Transmirra Products Corp., 353 U.S. 222; Haili vs. United States, 9 Cir., 1958, 260 F.2d 744; In Re Application of Rogers, 9 Cir., 1956, 229 F.2d 754.

It is true that the Courts have construed the language to cover certain acts which are not strictly negligent in nature. However, the wrongful acts in such cases were closely related to negligence. For example, the Court in Hatahley vs. United States, 351 U.S. 173, 181 (1956), held that a trespass, in the confiscation of horses, was such a wrongful act as was contemplated. Likewise, in Aleutco Corp. vs. United States, 3 Cir., 1957, 244 F.2d 674, it was recognized that the wrongful conversion of certain property by the United States constituted a compensable wrongful act. United States vs. Ein Chemicals Corp., D.C. N.Y., 1958, 161 F. Supp. 238, supports Aleutco's holding that the wrongful conversion

of property is such tortious conduct as is covered by the language in question. Plaintiff urges that under the plain language of the Act the defendant is liable if a private person would be liable. Clearly, this language must be read and construed with the other language of the Act. The test would be whether a private person would be liable to the plaintiff for "negligent or wrongful act or omission" of a government employee as defined and limited by the legislative history and Court decisions construing the Act.

I feel that the Lender, when it accepted the completion agreement and took over control of the project under which it was to provide long-term financing, was not acting in the exercise of a discretionary function. The Lender had an absolute obligation to furnish such long-term financing.

I express no opinion on the statute of limitations nor the legal effect, if any, of the indemnity agreements executed by plaintiff.

I conclude that I have no jurisdiction under the Tort Claims Act and that this cause must be dismissed without prejudice. No testimony was taken on defendant's counterclaim and that issue is not before the Court. If the government decides to proceed in this Court on such counterclaim, a trial date will be assigned.

This opinion shall stand as my findings and conclusions on plaintiff's claims. An appropriate judg-

ment of dismissal without prejudice shall be prepared and presented.

Dated this 8th day of February, 1961.

/s/ JOHN F. KILKENNY,
District Judge.

[Endorsed]: Filed February 8, 1961.

United States District Court
District of Oregon

Civil No. 9403

RAY B. WOODBURY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT OF DISMISSAL

Kilkenny, J.:

The findings of fact and conclusions of law found by the Court in the opinion filed in the above cause on the 8th day of February, 1961, be and the same are hereby adopted as the findings of fact and conclusions of law in this cause, and based on the conclusion that the Court has no jurisdiction of plaintiff's claims under the Tort Claims Act,

It Is Ordered And Adjudged that plaintiff's complaint and the causes therein set forth be and the same are hereby dismissed, without prejudice.

Dated this 24th day of February, 1961.

/s/ JOHN F. KILKENNY,
District Judge.

[Endorsed]: Filed February 24, 1961.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Ray B. Woodbury, plaintiff above named, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment of dismissal entered in this action on February 24, 1961.

KING, MILLER, ANDERSON, NASH & YERKE,

/s/ NORMAN J. WIENER,

/s/ PAUL R. MEYER,
Attorneys for Plaintiff.

[Endorsed]: Filed April 11, 1961.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Bond No. B-87629

Know All Men By These Presents

That we, Ray B. Woodbury, as Principal, and United Pacific Insurance Company, a corporation organized under the laws of the State of Washington, having an office and usual place of business in the City of Portland, County of Multnomah, State of Oregon, as Surety, are held and firmly bound unto the United States of America, defendant above named, in the sum of Two Hundred Fifty Dollars ($250), lawful money of the United States of America, for which payment well and truly to be made unto said United States of America, we bind ourselves, our heirs, legal representatives, successors and assigns, jointly and severally, firmly by these presents.

Whereas, in an action pending in the United States District Court for the District of Oregon between said Ray B. Woodbury, as plaintiff, and United States of America, as defendant, a judgment of dismissal was rendered against Ray B. Woodbury, as plaintiff, on February 24, 1961, and Ray B. Woodbury having filed a notice of appeal from said judgment of dismissal to reverse said judgment of dismissal on appeal to the United States Court of Appeals for the Ninth Circuit,

Now Therefore, the condition of this obligation is such that, if Ray B. Woodbury shall pay all costs if the appeal is dismissed or if the judgment of dismissal is affirmed, or such costs as the appellate court may award if the judgment of dismissal is modified, then the above obligation shall be void; otherwise it shall remain in full force and effect.

In Witness Whereof Ray B. Woodbury, as Principal, has hereunto set his hand and seal and United Pacific Insurance Company, as Surety, has caused its name to be subscribed hereto by its representatives thereunto duly authorized and its corporate seal to be hereunto affixed by its attorney-in-fact, this 11th day of April, 1961.

/s/ RAY B. WOODBURY,
Principal.

[Seal] UNITED PACIFIC INSURANCE COMPANY,

By /s/ C. H. WERTON, JR.,
Attorney-in-Fact.

Countersigned:

D. K. MacDONALD & COMPANY,
Oregon, Inc.,

By /s/ C. O. TATE,
Resident Agent.

[Endorsed]: Filed April 11, 1961.

[Title of District Court and Cause.]

CERTIFICATE AND ORDER

Whereas the court entered its judgment of dismissal in the above-entitled action on February 24, 1961, dismissing plaintiff's complaint and the cause therein set forth, and

Whereas defendant's counterclaim herein is still pending before the court, and

Whereas the court in entering said judgment of dismissal on February 24, 1961, intended to make said judgment of dismissal final pursuant to the requirements of Rule 54(b) F.R.C.P.; now, therefore, the above-entitled court hereby makes the following

Finding

There is no just reason for delay in the entry of final judgment on plaintiff's complaint and the following

Direction

An entry of final judgment on plaintiff's complaint shall be made herein.

Based upon the foregoing finding and direction it is hereby

Ordered and Adjudged that said judgment of dismissal be and the same hereby is made final, and it is further

Ordered and Adjudged that this certificate and order be entered nunc pro tunc to appear of record as of February 24, 1961, which is the date when said judgment of dismissal was originally made and entered.

Dated this 21st day of April, 1961.

/s/ JOHN F. KILKENNY,
District Judge.

[Endorsed]: Filed April 21, 1961.

United States District Court
District of Oregon

Civil No. 9403

RAY B. WOODBURY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Before: Honorable John F. Kilkenny,
District Judge.

Appearances:

MESSRS. NORMAN J. WIENER and
PAUL R. MEYER,
Of Attorneys for Plaintiff.

MR. C. E. LUCKEY,
United States Attorney, District of Oregon,
Appearing in behalf of the United States of America, and

MR. GEORGE W. PRYOR,
Appearing in behalf of Housing and Home Finance Agency.

TRANSCRIPT OF PROCEEDINGS

December 12, 1960

The Court: Gentlemen, I will ask you to give your ideas here on how we would proceed this morning. Then I will try to outline procedure for you, just so we get your thoughts on that.

Mr. Wiener: If the Court please, I might bring the Court up to date on a conference Mr. Luckey and I have had in the past few days to attempt to give to you what we think the procedure is.

We recognize the complexities of this case, and I am sure the Court in view of the voluminous file has recognized many of the complex problems. In view of that, it would appear to both counsel for the Government and ourselves that the difficulty in this case is transmitting to the Court in some abbreviated form facts which have taken some three years to develop.

We have, therefore, gone through the chronological listing contained in the pre-trial order, in numerous instances gone through the chronological listing of the pre-trail order which contains some

1180 different chronological items starting from 1949 and going into 1958. We have taken from the files of the Government, primarily from the Government, these eleven hundred and some-odd items, and they are now in a file drawer before Mrs. Mundorff's desk. So out of the voluminous files the first thing we have done, we have abstracted those. [2*]

In a further attempt to bring this in focus, counsel for plaintiff—that is, myself and Mr. Meyer—have numbered the particular documents which we think bring into focus the issues that are involved in this case. I believe Mr. Luckey has done the same thing.

With respect to those, I would say that we have approximately 150 out of eleven hundred some-odd items which we think bring into focus the issue that is before this Court on this segregated issue. So from the plaintiff's standpoint it would appear that there are three phases to the trial on this issue. One is to present to this Court almost some 150-odd exhibits, part of the records of the Government. That is the first phase.

The second phase, your Honor, would be short oral testimony which will add some to the exhibits but are primarily for the benefit of putting certain witnesses before the Court so that the Court may ask questions that he may have.

Those witnesses are Mr. Woodbury, the plaintiff in this case seated at my left, Mr. Herbert Hardy, attorney, who is not in the courtroom but

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

who is available upon telephone call, and Mr. Harry Langton sitting in the far corner over here in the front of the Bench, who was the Project Manager from the period of 1954. The oral testimony would not, in my opinion, take very long.

The third phase of it, and we have discussed it [3] with Mr. Luckey, is the reading into the record from depositions of the testimony of witnesses of the United States; that is, various employees of various agencies involved here, which was done over the course of several years in pretrial proceedings.

Now, I believe, your Honor, that that would be the extent, certainly the extent of the plaintiff's case. I think Mr. Luckey intends to do the same thing, and I think that his procedure is the same. I will let Mr. Luckey speak for himself on that phase of it.

The Court: Mr. Luckey?

Mr. Luckey: I think our procedure, your Honor, would follow the same general pattern. Of course, we would point out that there are some documents that are here from Mr. Woodbury's files, Columbia Supply's files and Aleutian Homes' files. There are some numerous depositions that have been taken both of the parties on both sides, and as to Government's witnesses as well, we of course with reference to Government's witnesses will necessarily be guided very largely, because we believe it is a documentary case primarily, upon what the witnesses for plaintiff may testify. We

would not have more than two or three witnesses, your Honor. [4]

* * *

Mr. Wiener: Thank you.

We have prepared, your Honor, a chart for the sole purpose of assisting the Court in identifying the various agencies and various parties involved in this case.

First of all, it is my understanding of why we are here this morning is that the Court by its order of November 4th directed that this case proceed to trial on the segregated issues of, one, whether or not the Government could be a fiduciary, and, two, whether or not the Government, [8] assuming it is under the facts of this case, was a fiduciary.

On the first question, it would appear to us that this is a question of law which we have amply raised and searched in various briefs heretofore submitted to the Court, so I will not attempt to argue the law unless the Court specifically requests. [9]

* * *

The Court: You may call your first witness or start with your first exhibit, Mr. Wiener.

Mr. Wiener: I assume it is perfectly all right to introduce these exhibits without the necessity of having a witness on the witness stand?

The Court: That is correct.

Mr. Wiener: At this time, your Honor, we have already stipulated. Counsel and I have already stipulated that certain exhibits may be introduced

in the trial, but for the record we will now introduce or offer into evidence Exhibits 1 to 1176 of the two file drawers that are in front of the Bench. They are numbered; the exhibits have been marked. We now offer those in evidence pursuant to the stipulation.

The Court: I would ask now, before Counsel responds to that, whether on this issue there is any claim, and I understand differently, but I want to get it straight here. Is there any claim that all of these exhibits have relevancy or materiality in so far as this issue is concerned?

Mr. Wiener: No; from the standpoint of the plaintiff [63] the answer is No.

The Court: Then I would suggest this: I would suggest that you offer in evidence only those at this particular time. Now if you want to offer them just for the purpose of what may happen later in the trial, we can do that, but as to the exhibits which you feel are relevant and material, only those should be offered at this time. I do not want to have just a blanket offer, something that might be binding on the Court, something that someone might pick out on a question of appeal on either side if my decision on this issue would be appealed. Are you in a position to do that now?

Mr. Wiener: Yes, your Honor. I would like the record to show that I have already stipulated things that can be done, but, of course, that is subject to the Court's approval. As far as I am concerned, we will have picked out the documents which we think have relevancy.

I might point out that it has been agreed that the chronological statement which is the basis for these 1176 documents has been agreed upon as chronological.

The Court: That is correct. That is in the pre-trial order.

Mr. Wiener: That is in the pre-trial order, and, in addition to that, there are some agreed facts in the pre-trial order which I have attempted to summarize.

The Court: That is true. I have read the [64] Agreed Facts, not once but twice. I do not pretend to remember them all, however; but if you would proceed that way, Mr. Wiener, that will be fine.

Mr. Weiner: Thank you. At this time, your Honor, I would then like to introduce as—or offer into evidence as Exhibit 1177, which has not yet been marked and merely, your Honor, for the purpose of assisting the Court, not for conclusion—that is, the document is no evidence in and of itself but merely as an aid to the Court, the chart which I referred to in opening statement.

* * *

The Court: Is there any objection, Mr. Luckey?

Mr. Luckey: No objection, your Honor, for that [65] purpose.

The Court: Those numbers will be assigned to those exhibits, and the exhibits are admitted.

(Chart previously referred to and marked as as Plaintiff's Exhibit 1177 for Identification

and photograph from Kodiak Mirror dated November 26, 1960, previously marked Plaintiff's Exhibit 1178 for Identification, were thereupon received in evidence.)

Mr. Wiener: Another point which Counsel and I have discussed which perhaps should be brought up at this time, there are again numerous interrogatories and requests for admissions and answers, and so on, which are part of the Court's files. It is my understanding of the practice that for this to become a part of the transcript of the record they should be offered in evidence. I have discussed it with Counsel as to whether or not we are concerned with any of them. They may become part of the transcript of the record of this case, and we now offer all the interrogatories and requests for admissions and the answers to the interrogatories, all the answers and admissions. There are seven in number.

The Court: Then I assume if they are to be received that the Court's attention will be directed to that portion [66] of those interrogatories and the answers that may have relevancy or materiality on this issue. Otherwise, I do not want to fill the record with that material. [67]

* * *

Mr. Wiener: On Page 70, the fourth date, March 31, 1952, from the Secretary of the Navy Whitehair——

The Court: If you would read the number off, we can get that.

Mr. Wiener: 115, and it is Whitehair to Richards, Whitehair being the Secretary of the Navy and Richards being the Commissioner of FHA. This is replying to prior correspondence mentioned from Bettinger indicating that a new sponsor was in the picture and reaffirming prior certifications by the Navy that they need these houses up here and that conditions have not changed since 1951 and, well, reaffirming the need for this project at least as far as the Navy saw it.

Mr. Luckey: No comment, your Honor.

The Court: Admitted.

(Document above referred to, [79] previously marked Plaintiff's Exhibit 115/48 for Identification, was thereupon received in evidence.) [80]

* * *

Mr. Wiener: The next document is the following one dated June 12th, a memorandum from Morse to Seward.

I might comment that, since Counsel has mentioned it, Mr. Morse was employed by HHFA. Brice Mortgage was in this picture. Mr. Morse at about this time resigned from HHFA or apparently decided to resign from HHFA to go to work for Brice. He prepared a full document apparently just setting forth his position and why he was going to work for Brice.

The only thing we claim, the reason we think it is important here is because he reviewed in mi-

nute detail the basis for this loan, the interest of the Government in it, the fact that—the whole history of it in 1951 and '52, what led to its signing, the fact that in his opinion this loan was perfectly justified under all proper procedures. He points out that the loan conditions are more strict than any of those approved by the Administrator under the Alaska Housing program.

The purpose of this is not to justify Mr. Morse one way or the other. It doesn't have anything to do with that, but he set forth in some chronological order what had happened, what had developed and what had transpired during these three years.

This man, incidentally, was the man closest [96] to the project as far as HHFA was concerned up until the change in administration here. You see, we had a new President come in in 1952, which made changes in this over-all program. This is No. 289.

Incidentally, Morse had nothing to do with this project after he went to work with Brice. That was a condition of his leaving this agency, that he not participate in Brice's participation.

Mr. Luckey: No comment, your Honor. It speaks for itself.

The Court: Admitted.

(Document above referred to, previously marked Plaintiff's Exhibit 289/A2 for Identification, was thereupon received in [97] evidence.)

* * *

Mr. Wiener: Next page, 125, letter of January 27, 1954, the second January 27th, from Hazeltine to Cake, Jaureguy & Hardy—just to deviate from what has been now brought before the Court, and I do not think there is any dispute about it—this Completion Agreement was drafted prior to January 27th in Washington, D. C. We won't go into who drafted it or what the terms are, but, anyway, it was drafted, which led to a letter on January 27th from Hazeltine to Mr. Hardy who has now for the first time been brought into this picture, which says, "The attached Completion Agreement * * * has been the subject of negotiation between Aleutian Homes, Inc., and representatives of this Agency during the past week.

"The terms of this Agreement appear generally acceptable to us; however, prior to formal submission for approval by the Administrator it will be necessary for you to obtain the following: —" Now this was on January 27, 1954, and these are some of the larger things of the items; that Woodbury can put up funds in the approximate sum of $60,000 for overhead; that evidence be produced that the [112] Completion Agreement will not render the permanent first mortgages uninsurable by the FHA, in other words, that they won't take the FHA out of this picture; and that also satisfactory evidence that this Completion Agreement will not adversely affect the sale of the permanent first mortgages to FNMA.

So Hazeltine's concern is at this time that Woodbury put up $60,000 for overhead and that the long-

term commitments not be affected adversely one way or the other by this document.

Mr. Luckey: We think that is significant, your Honor, because if HHFA was going to keep these commitments alive or reasonably to keep them alive, they would not have been concerned about providing overhead funds for that.

The Court: Admitted.

(Document above referred to, previously marked Plaintiff's Exhibit 512/4 for Identification, was thereupon received in [113] evidence.)

* * *

Mr. Wiener: The next document is quoted in full on page 134. It is April 5, 1954, Hazeltine to Cole.

This is a note from the second in command to the No. 1 man, Exhibit 562.

This document provides a resume of the action that has been taken up to this particular time, obviously attempting to inform the top man as to what has happened; sets forth an analysis of the complete projects; suggests modification of certain documents; analyzes the costs of completion, analyzes the method of taking out the interim loan by the long-term loan, and makes a recommendation as to what is to be done; points out that,

"If the proposed Completion Agreement is placed in operation, Woodbury will withdraw from all active participation. A Project Manager and a Project Superintendent will be selected satisfac-

tory to the Agency, and they will be [128] responsible for all operations until our loan is repaid. In addition, Woodbury is required to pay all overhead expenses, including extraordinary expense of HHFA personnel, and there is now in the hands of Mr. L. R. Durkee, Area Representative, a cashier's check covering funds supplied by Woodbury in the amount of $60,000 for these purposes."

I am reading that from this document.

This, from our viewpoint, represents this particular—well, the Agency's views on this matter at this particular time, and we can see a recommendation which is acted upon here in a few documents later.

Mr. Luckey: This is an internal memoranda, your Honor. Mr. Wiener calls him second in command. Actually, he was not second in command. Mr. Cole was the Administrator. Mr. Hazeltine was the Administrator of the Community Facilities Administration. To say he was a different type of administrator as being second in command—he had the command function of delegated authorities in connection with this particular project, but he was writing to his superior who had not delegated the authority to authorize the further disbursements under the loan after default, and the memorandum points out that there are many conditions related to the proposed further disbursements and that it was worked out [129] with Mr. Herbert Hardy who contacted the Agency in January, presenting plans which, after some revision and conference with this

office, appeared to be workable. That is the substance of the memorandum.

It is significant to note here the understanding of the plan by Mr. Hazeltine:

"The plan also provides that, subsequent to the repayment of our loan, the remaining non-lienable creditors together with R. B. Woodbury and yourself will agree upon a Trustee who will be appointed to supervise liquidation of all other creditor claims remaining."

It indicated after HHFA's loan was paid there would be still other creditors, and other creditors and Woodbury would have to get together and name a Trustee if this plan were carried to completion.

The Court: Admitted.

(Document, Memo from Cole to Hazeltine, April 5, 1954, previously marked Plaintiff's Exhibit 562/A-4 for Identification, was received in evidence.) [130]

* * *

Mr. Wiener: Now, your Honor, we come to the Completion Agreement itself. We are finally there on page 142, and this document 583/1-140, and this is the signed document. [136]

I am sure we could make many comments on these. I call the Court's attention—you do not have this in front of you, but I call the Court's attention——

Mr. Meyer: Here are two copies.

The Court: There is a copy attached.

Mr. Meyer: Which is the original which can be handed up to the Clerk.

Mr. Wiener: The Government is referred to in this document as the Lender, top of page 2. They refer to the "Housing and Home Finance Administrator, hereinafter called 'The Lender.'" The document is not signed by the Housing and Home Finance Administrator.

The Court: There is no place for the signature?

Mr. Wiener: There is no place for the signature.

The Court: The parties have a paragraph in there which shows the rather definite intention that it was to be signed. It was never so intended that they were to sign; is that correct?

Mr. Wiener: Well, that would be my interpretation of that language, that it was not contemplated that the Housing and Home Finance Administrator would be signatory, would sign this.

The Court: Or any other governmental agency, such as the FHA or the FNMA?

Mr. Wiener: I agree with the [137] interpretation.

The document provides that the Lender shall do certain things (bottom of page 4) including the deferment of collection of interest due under his loan. I call to the Court's attention that the language used in Paragraph 11(c)——

The Court: How do you construe that language there, Mr. Wiener?

"This Agreement is subject to compliance with the following conditions by Lender:"——

Mr. Wiener: How do I construe it?

The Court: Yes. I have this question: The Lender, does that indicate to you in any way that the Lender didn't have to do it; that he might do it, but that he could back away from the agreement at any time, or he didn't have to go ahead with the agreement as such?

The language is so peculiar, "This Agreement is subject to compliance with the following conditions by Lender." Even though the Lender is not a party, it does not say, "The Lender shall," or "The Lender will."

Now in the subdivisions that language is used, but in the general condition there, "This Agreement is subject to compliance with the following conditions by Lender," well, if the Lender didn't do that, then what happened to the agreement? I know we are not going to argue that out now, but that is one of the principal things here, but if you [138] have something, it would seem to me all the way through that this is rather peculiar language in the agreement.

Mr. Wiener: You have asked my opinion, have I, and I will just briefly state it.

The Court: Yes.

Mr. Wiener: My opinion, this was a document which, for all practical purposes, was a contract between everybody that is stated here, including the Lender. This is my opinion. It is true that this document was not signed—there is no question

about that—by the Government, but it was accepted in that language by a letter which we will shortly come to. It speaks in the traditional form of an obligation on the part of a party to a document.

The Court: That particular language, that is what I am inquiring about. To me, it seems that that language actually modifies or is a modification of what is the language which is usually customarily used in order to bind a person.

"This Agreement is subject to compliance with the following conditions by the Lender." Let us look at it this way just for the moment: Suppose that we were not in the position that we are in there, but we are attempting to secure financing from some other source, and suppose we are getting that financing from a bank rather than from the Government and then we had that language, "This Agreement is subject to compliance with the following conditions by [139] the Bank," and you had mentioned the name of the bank.

What is running through my mind is what that language would mean when you apply it, the circumstances there, if you were starting on a new agreement. Would you then feel that there was an obligation of the bank to go ahead and comply with (a) and through the others there? That would be (a), (b), (c) and (d).

Mr. Wiener: Well, my answer, as I would understand it, would be that this language that you have just quoted, "This Agreement is subject to compliance," is another way for saying that this agreement is subject to being accepted by the bank

in your hypothetical upon the ground that it will do certain things or, stating it a little differently, that this agreement will have no effect unless the bank in your hypothetical agrees that it will in exchange for the rights it has got herein, will agree to these other items which are spelled out, (a), (b), (c) and (d). In other words, I think——

The Court: In other words, you think, Mr. Wiener, that actually in construing the whole transaction here that there is something missing from the agreement as such?

Mr. Wiener: Well, I would say with all due—I would think that it is not carefully drafted in the sense that it expresses fully what the parties intended at this time, but I think this is in the nature, your Honor—that these [140] people who have signed—it is in effect an offer, in legal effect, in effect an offer to the Government which, for reasons which are not clear in the record—I don't know why they didn't sign this because they signed the Building Loan Agreement. They signed the Disbursing Agreement. I mean, the Housing and Home Finance Administrator signed——

The Court: I might be advised on this better if I reviewed the briefs again. It is some time since I have been over them.

I know it is indicated in some of the correspondence here some place that as a matter of law the Government felt they couldn't sign such an agreement.

Mr. Wiener: I think it is indicated somewhere in here that they felt they couldn't sign it.

The Court: That is in the last paragraph of the agreement as such.

Mr. Wiener: Yes, your Honor, but that then becomes a question of law whether they could in fact sign at all. It appears from our reading of the various housing statutes under which they are authorized, that they had authority to do anything they wanted. They had a revolving fund set up. They did have authority, but they maybe felt that one of the Government attorneys advised them they couldn't sign this document—I don't know—but the legal effect is—and I cannot emphasize this too strongly—that we believe this [141] document created a status whether it in fact—we are not suing here for breach of contract—it created a status, and whether in fact or not there was a binding legal contract for which we could sue for the breach is not—we have not raised the question because what did happen here, as I say, it created a status which was acted upon by the subsequent acts here which indicated a certain position or a certain relationship or duty on the part of the Government. It is an attempt to bring this all up to date and is certainly what finally happened.

I think if the question was whether there was a breach of contract, that our position would be that this was an offer to the Government which was supported by a letter of about May 21st which we will be coming to very shortly, which in fact thereby made the Government, whether they signed it or not, a party to the contract, and this is not foreign to the law at all, because in lots of Court

of Claims cases where these contract cases generally arise, the Courts clearly say—I mean the Court of Claims has said in many cases that you can have an implied contract in law whether in fact there is an express contract, but I don't think we have to reach that—at least from our theory we do not have to reach the problem of whether in fact this was a binding legal contract. We do think it created a status, a relationship which the Government operated under [142] thereafter, assumed certain rights, obtained certain rights including the payment of moneys, which created certain duties. I mean, that is our position.

The Court: I understand your position.

Mr. Wiener: In any event, this document does provide that the Construction Superintendent shall be appointed and acceptable to Lender.

There is discussion in here as to the overhead agreement. I started out to point out that the, that at the top of page 4 of the Completion Agreement Woodbury agrees to execute and deliver to Lender an agreement to provide necessary overhead expenses for the completion of the project. Now, the language, "for the completion of the project," has been the subject of a great deal of interpretation by a lot of people, but I do call then for the Court's attention paragraph 11(c), your Honor, on page 5, where, "Lender will defer collection of interest due under loan until completion of project."

Now, that is an ambiguous term, but I think that the only proper and fair interpretation of it, looking at the status of the parties in April, 1953—

April, 1954, they expected to complete this project in October of 1954. This was the estimated completion date. The interest was to be held until October, 1954. The overhead was not to be paid until October, 1954. [143]

Now, why I emphasize this and I point out that the same language was used for both of these paragraphs is because there is much reference in 1955 and in 1956 to the fact that Woodbury in the year 1956 has not paid $15,000 for his overhead. This was in 1956, and the Government's position apparently was at that time that the $15,000 obligation continued until the loan was recast.

I emphasize this, that could not have been within the contemplation of the parties on either side because when they use the term, "completion of agreement," they must have been contemplating the physical completion of the project, not the recasting of the loan or the taking out of the loan, and much of the problem that developed here, as you will subsequently see, is because of the fact that somebody in the Government got mad at Woodbury because he didn't put up $15,000 for overhead in the year 1956, which we do not think can be read into the documents.

In any event, this is an important document, there is no question about it, and it has problems of construction that we differ on.

We would offer that in evidence, 583/1-140.

Mr. Luckey: If this be an offer, your Honor, which creates a status on the part of the Administrator, I certainly submit that the built-in safe-

guards of the offer to induce the Lender to make further disbursements cannot be read out [144] of the document and the agreement.

Paragraph 13 says that the obligations of any party signatory hereto shall not be released, discharged, or in any way affected.

If it is the position of the plaintiff that a party signatory by some operation other than signing this paragraph, this paragraph there mentions, "* * * or in any way affected, nor shall claimants or other parties signatory have any rights or recourse against Lender," and by a built-in provision the Lender is really deemed a signatory, and this should be influential in determining our obligation as Lender, "* * * shall have any rights or recourse against Lender by reason of any action Lender may take or omit to take under the foregoing powers; nor by reason of any action taken by Lender which in its opinion may be necessary to keep said project free from liens."

And Paragraph 14 is particularly significant as setting the stage for the early documents, the context in which this inducement was made:

"All provisions and requirements of loan documents executed in connection with loan by Lender to Owner shall remain in full force and effect, except as expressly modified;"

Now, the express modification concerned the extension of maturity dates, deferment of interest, and [145] things of that kind, and all the provisions of the trust deed would remain in force; all the provisions of the Loan Agreement, all of the

provisions of guarantees, and, as I pointed out in the letter that has previously been introduced here within the last few minutes, the Lender would not accept any other situation in the language of the letter to Mr. Durkee, concerning the Pacific-Alaska Contractors. The objection that there should not be any recourse against the Lender, that is what they are talking about right here.

Then in paragraph 18 the Court has pointed out and is aware, "No provision has been made for execution of this document by the various Federal, State and Territorial Agencies who are Claimants or by the Bank of California since the national banking laws and laws and regulations affecting such agencies do not authorize the execution of such Agreement."

There is no ambiguity in that language on the part of, in the first instance, the people who are offering this inducement to discuss disbursement of loan procedures. "It is understood that either a written or oral approval of this Agreement will be obtained from them, if possible."

Mr. Wiener suggests there is a lot of power on the part of the HHFA to do a lot of things here with reference to signing an agreement, and so forth. I suggest if there were any power of that nature it would be vested in [146] the Administrator, and any writing in that type of situation would be directed all the way by citing clause of the statute with regard to an Administrator, but that does not bind the United States which in this situation would not be a party defendant properly.

If there can be read into these paragraphs any fiduciary situation or acceptance of a fiduciary obligation by the Government expressly, I fail to see how any party, be it the Government or otherwise, your Honor, can by agreement protect itself against the imposition of a fiduciary obligation upon it. It couldn't be clearer that this was not the intent of the HHFA, not the intent of the United States, and in the absence of overreaching or undue imposing of evidence that shows attributes of a fiduciary relationship, it escapes me how in the face of these particular clauses in this Completion Agreement it can be asserted in good faith here that there was a fiduciary obligation in the contemplation of the HHFA here.

Now, if it is by operation of law, certainly there has been nothing in the pleadings to show or to suggest any overreaching, any unfair action, or anything of that kind. The only thing that has been alleged here is that we favored ourselves as a creditor by taking this foreclosure action really, and that, of course, is in the contemplation of the entire Completion Agreement. [147]

The Lender in order to disburse this additional loan, had to have certain safeguards and, certainly, a lender in protecting himself in that manner in disbursing the balance of the loan couldn't by that alone, even though he had some safeguards against disbursements, become a fiduciary.

Everybody understood. All the creditors, all the signatories to this document which Mr. Woodbury saw on several occasions and his attorney, Mr.

Hardy, understood that the Lender was not abrogating its original security documents and not accepting any responsibilities over and above that that they did have originally, which would affect their security documents before.

I think that the agreement is important. I think it is a critical document in the entire case. There are others to support it, but they were the same type of exculpatory language so far as the Administrator is concerned, and they go right through supporting the proposition that there was not any fiduciary relationship.

The Court: The exhibit is admitted.

(Document, Completion Agreement, previously marked Plaintiff's Exhibit 583/1-140 for Identification, was thereupon received in evidence.) [148]

* * *

Mr. Wiener: On page 175, the middle of the page, January 31, 1955, a letter from Cole, the top man in HHFA, to the Secretary of Navy.

Now a comment is made in our brief about [180] this particular point so I call it to the Court's attention. This was, in effect, a statement from one top Government agency to another one offering, as we see it, to sell this project to the Navy. The comment is made that the project was constructed in compliance with certain FHA requirements at a cost of approximately five and a half million dollars and FHA has placed an appraised valuation of $5,892,800 on the completed project.

I mentioned this in the course of opening statement. The comment is made that this would be advantageous to the Government to permit this agency to further its program of orderly liquidation of its investments in Alaska if the Navy would be interested in purchasing for its own use this housing project.

The Court: This was before a default was declared, or was there a default at this time?

Mr. Wiener: In the interim loan?

The Court: Yes.

Mr. Wiener: No, there was no default at this particular time, and the FHA and Fanny Mae commitments were in full force and effect at this particular moment, but its release of commitments is June 1, 1955, your Honor, so we are talking about now in January.

Mr. Luckey: There was always a default, your Honor, under the theory of the United States, in the HHFA—— [181]

The Court: I know your theory on this, that the default continued even under the Completion Agreement.

Mr. Luckey: That is right, and, as pointed out here by the Project Manager and his attorneys in the previous document that is in here, there was a $394,000 deficit plus $328,000 principal that they couldn't meet, so the Completion Agreement was not in a position to be at that time—it couldn't be consummated, and this is only an explanatory letter to examine details under which a transfer

might be accomplished. It does not offer the property. It talks about the possibility of sale.

Mr. Wiener: Well, my comment on Mr. Luckey's comments is that the terms of this short-term note were extended on two different occasions, once for six months and once for four months, beyond the due date on the short-term note, and I do not understand Counsel's comments that the note for a short-term loan was in default at this particular time because the record indicates clearly that there were two extensions of due date on that note.

Mr. Luckey: They did extend it from time to time, your Honor; that is true.

The Court: 802 is admitted.

(Letter to Secretary of the Navy from Housing and Home Finance Agency, January 31, 1955, previously marked [182] Plaintiff's Exhibit 802/65 for Identification, was thereupon received in evidence.) [183]

* * *

Mr. Wiener: The next exhibit, your Honor, is probably one of the key documents in the case. It is from anybody's standpoint. It is on the bottom of page 179, Document of March 7, 1955. It is from Hazeltine, who is now head of the CFA, to his superior, Cole, the head of HHFA, and this document is quoted in full in this pre-trial order. The posture of this letter must be considered that at this particular time FHA had denied the application for the increase in commitment. Just a short three weeks prior to this date, this same Hazeltine

had said, "We are now going to proceed with the recasting and taking out of the mortgages," long-term [195] mortgages, which on this particular date the commitments were still in existence. So, of course, as Mr. Luckey says, this document speaks for itself, but we believe that this led to the decision to abandon the commitments for whatever valid reason might have been set forth therein.

I call particular reference to the Court's observation of the language quoted on page 182, the middle of the page, beginning with the paragraph, "This recommendation——"

The Court: Yes.

Mr. Wiener: The conclusion and recommendation is based upon the statement there that it is superfluous for one agency under the same head to go to the trouble and expense of transferring this short-term loan over to the long-term loan despite the legal commitments that were then in existence.

Now this decision, your Honor, is in the Government files. It is no knowledge out here to Langton, no knowledge to Woodbury or to Aleutian Homes, but this was the decision that was reached, and at a subsequent date here it was approved by Cole and thereafter followed.

As a matter of fact, this original document that I have in my hand here signed by Hazeltine has penciled or in ink on the bottom of it, 3-21-55 the date, "O.K. to follow recommended procedure using first alternative plan above described." And the first alternative plan above described [196] is that

at Paragraph 1 on the bottom of page 182 which says,

"Continuation for a period of approximately six months of the present operation, whereby Aleutian Homes, Inc., is continued as a corporation but under complete control and supervision of the Administrator. Should this seasoning period develop the fact that the project has possibilities of normal payout a repayment program could be worked out and congressional enactment requested to transfer either to FNMA or FHA. There is a further possibility that the Navy's interest in this project might materialize in the form of an outright purchase."

I do not want the Court to misunderstand or Mr. Luckey. We do not question either the good or bad faith. It appeared to be perhaps a sensible procedure at this particular time to do this, but, nevertheless, this was the decision that was made and which was followed, carried out, as we will point out by subsequent correspondence.

Mr. Meyer: May I make one comment about where this document comes from, your Honor. You will notice at the end of the description in the pre-trial order it refers to having come originally from Exhibit 1, Document 207.

Exhibit 1 of the pre-trial order was what [197] was called a collateral file, and your Honor will note that all the contract documents from the loan authorization, the note, the deed of trust, the various construction contracts, all the contract docu-

ments are kept by the Government in what they call the collateral file.

This was considered apparently by the Government of sufficient importance as a contract document in the fact that this was placed and numbered in that collateral file, and that is where it was found. It is Document No. 207 in Exhibit 1 to the pre-trial order, which was this collateral file.

Mr. Luckey: I think it will be an unusual day when the file clerk will determine the course of litigation of this kind, your Honor. However, the document itself is concerned with whether there should be foreclosure at this time or some further attempt to work out a financing structure that will prevent foreclosure.

There is a lot of language in here that Mr. Hazeltine used, words of control, and so forth, to influence the Administrator who, you will recall in the early documents, didn't exactly, wasn't exactly happy about this loan when it was found in the office, but he anyway continued to carry this project without foreclosure, and that is the context in which the Commissioner of Community Facilities who had been close to this project came to [198] completion under the direction of the Project Manager who was representative of Aleutian Homes in Kodiak, trying to influence his superior to adopt this course of continued extension of loan.

The Court: 832/A-1-207 is admitted. [199]

* * *

Mr. Wiener: Page 185, second from the top, March 28, 1955, memorandum from Tyler of

FNMA to the files, in which this Loan Manager of Fanny Mae indicated he had had meetings with various representatives or with the representative of the HHFA to discuss this over-all thing. The comments on the discussion are contained in this memorandum.

One of the comments is made that the question was asked if Fanny Mae and FHA would be willing to refund any part of their fees. You see, by this time extensive commitment of fees had been paid to Fanny Mae and FHA, and his comment was as indicated there in the middle:

"This question was posed on the basis that the HHFA Administrator might elect to hold his blanket mortgage."

Our comment is that at this time with the increase in commitment of FHA funds having been denied, there was [201] discussion at the Washington level of the possibility of making the short-term loan a long-term blanket mortgage, which would permit the orderly retirement of its payment as distinguished from default status that it was about to be under.

Mr. Luckey: Just a discussion, your Honor, not binding on anyone.

Mr. Wiener: On the same page, the next document——

The Court: No. 849/49-4 is admitted.

(Memorandum re Aleutian Homes, Inc., dated March 28, 1955, from A. C. Tyler, Loan Manager, previously marked Plaintiff's Ex-

hibit 849/49-4 for Identification, was thereupon received in evidence.)

Mr. Wiener: The next document is March 28, 1955, a correspondence now from Hazeltine in Washington to Langton out here in Portland. Discussion is had with respect to proposed individual mortgages, and he advised that it would be desirable to notify the creditors that the commitments were to be abandoned, and it contains a proposed form of letter to be sent under Langton's signature as Project Manager to the various creditors, including Woodbury.

This particular letter I have here of Exhibit 850 contains this proposed letter to be sent by Langton to these creditors. [202]

At this particular time, your Honor, the decision had been made to abandon the commitments.

Mr. Luckey: This is a proposal for a letter to the creditors indicating that the commitments might be abandoned under certain conditions, and that if certain conditions exist as of a particular time certain action might follow. There is no commitment of positive action in that letter.

The Court: No. 850/20 is admitted.

(Letter to Harry M. Langton from Hazeltine, March 28, 1955, with attached enclosures, previously marked Plaintiff's Exhibit 850/20 for Identification, was thereupon received in evidence.)

Mr. Wiener: On page 186, March 29, 1955, from Hazeltine to Cole. It goes into the details of the

Bank of California loan which was listed on the Completion Agreement, your Honor, at $150,000. As I recall, it was to be paid in two of four stages.

This letter comments that the bank appears in the Completion Agreement among "Stage 3" creditors. The comment is made that the bank was not signatory to the Completion Agreement.

The comment is made to Cole by Hazeltine that a letter for issuance to creditors by the Project Manager has been forwarded to Portland. [203]

Mr. Luckey: No comment.

The Court: That is No. what?

Mr. Wiener: 851.

The Court: It is admitted.

(Memorandum of March 29, 1955, Hazeltine to Cole, previously marked Plaintiff's Exhibit 851/A-20 for Identification, was thereupon received in evidence.) [204]

* * *

Mr. Wiener: Page 187 at the bottom of the page, No. 859, Langton to Hazeltine, in which he says he has now reviewed this draft of this proposed letter that came to him from Hazeltine, and he has got a comment; Langton's comment is that an addition be made to the end of the letter which would indicate—in which he forwards a draft of a revised letter which he suggests he be authorized to forward out to [205] creditors. We will see the final form as it comes out in a few minutes.

* * *

Mr. Wiener: The principal change on this was the addition of certain language in the last paragraph which has to do with the commitments.

This was a proposed letter to the creditors of this project:

"The FHA and FNMA commitments will be surrendered to avoid the expense of closing permanent first mortgages and extension fees, and if by October 31, 1955, it appears that the project has a reasonable chance of financial success, a refinancing plan looking toward long-range amortization of the Administrator's loan and repayment of other claims will be proposed by the Housing and Home Finance Administrator." [206]

Now we emphasize that because this was suggested, that this language be added. It was approved and it was sent out in that form which, at least to our minds, indicates that all through this period of time here it was contemplated by everybody concerned that this so-called refinancing plan would be by the HHFA if these commitments are released. It was known by everybody at this particular time that there wasn't any other alternative; only the Government would be in a position to refinance a project in Kodiak, Alaska, of this magnitude.

The application for a loan that had been filed in November, 1952, indicated every private source of funds had been exhausted. Everybody knew, at least it is our claim everybody knew if there was going to be any refinancing done, it had to be done

through a proposal made by the Washington offices of our Government.

Mr. Meyer: May I just clarify one minor point.

On page 186 of the pre-trial order, going back to the last paragraph of what is Exhibit 850, starting on the former page, this is the draft which Hazeltine prepared, sent to Langton and said, "send this to the creditors," and at the last paragraph as set forth in the pre-trial order it contains this paragraph which Mr. Wiener just read, and your Honor will note that it concludes with the language that, "* * * a refinancing plan looking toward long-range [207] amortization of the Administrator's loan and repayment of other claims would be proposed," what Mr. Langton added, and if your Honor will then turn to page 188 to the paragraph set forth about Line 23, at the end of that he added the phrase, "by the Housing and Home Finance Administrator."

That was the significant change that Mr. Langton made in the draft of the letter with respect to that.

Mr. Luckey: If the Court please, that certainly is not a commitment in the absence of a circumstance that never arose.

It was if by a certain date, October of 1955, October 31, 1955, it appears that the project has a reasonable chance of financial success, so that everybody realized there was a serious question about its reasonable chance of financial success.

This letter was written to Woodbury and the

others. I mean the letter was sent, the attachment was sent to Mr. Woodbury and to others pointing out the cost of taking out these individual mortgages. The question was whether the project would justify the money, and Woodbury in the Overhead Agreement, of course, was not putting up money. The Administrator would have had to put up funds of his own in order to accomplish because of the financial condition of the project at that time.

The Court: 859/20 is admitted. [208]

(Letter from Hazeltine to Langton, April 7, 1955, previously marked Plaintiff's Exhibit 859/20 for Identification, was thereupon received in evidence.) [209]

* * *

Mr. Wiener: The next exhibit is page 193, top of the page, June 6, 1955, No. 891. It is a memorandum from the San Francisco office, Herman, where he requests authority to [219] make payment to one of the creditors, Copenhagen.

The purpose of this is to show that decisions were being made in Washington with respect to various payments of creditors.

Mr. Luckey: No comment. [220]

* * *

The Court: Have I admitted 888, 891 and 894?

The Clerk: It is 891 and 894 and then 863, the telegram, that have not been received.

The Court: They are now admitted.

(Office Memorandum, Herman to Hazeltine, June 6, 1955, previously marked Plaintiff's Exhibit 891/A-21 for Identification, was thereupon received in evidence.) [222]

* * *

Mr. Wiener: The same page, November 22, 1955, No. 983 has been assigned, and it is a letter from Hazeltine to [239] Langton in which Hazeltine on this date says, "I am interested in recasting this loan on a permanent basis with provision for amortization of principal and interest and orderly retirement of other claims."

Mr. Meyer: Your Honor, I would like to make just one comment here.

In this letter he says to Langton, "I am in agreement with your recommendation and am requesting our Division of Law to prepare the necessary documents." Now this is with respect to the four-month extension. Now this is what appears in these top letters that we have seen in which he states, "I told Langton to resubmit his proposal to four months instead of six months." Then on the surface he comes back and says on the surface, "I am not accepting your proposal." But the proposal as shown in the first instance, all the way through, is initiated by himself telling Langton, "Propose this to me, and I will accept it."

Mr. Luckey: I saw a letter from Mr. Langton saying how about continuing the situation in a status not in default, something of that kind, and

to extend the maturity date under the blanket mortgage, or something. Then it will be noted in this, your Honor, Mr. Hazeltine says, "It will be appreciated if, shortly after the first of the year, you submit any ideas that you may have to meet this objective," that is, of recasting the loan on a permanent basis. [240]

The Court: No. 983 is admitted.

(Carbon copy of letter of November 22, 1955, Hazeltine to Langton, previously marked Plaintiff's Exhibit 983/21 for Identification, was thereupon received in evidence.) [241]

* * *

Mr. Wiener: The next document on the next page, 205, is from Herman to Hazeltine in which Herman now in San Francisco again makes an analysis of the operating statement, and he uses an estimated occupancy of 90 per cent.

The Court: This is on what page?

Mr. Wiener: Excuse me, on page 205, your Honor.

The Court: Herman?

Mr. Wiener: It says Emmert, but that is apparently a typographical error.

The Court: January 3rd?

Mr. Wiener: January 6th.

The Court: That should be Herman?

Mr. Wiener: That should be Herman, yes. The document I have in my hand indicates Herman rather than Emmert. It is signed by Herman also. It is Document No. 997. He makes [244] certain

forecasts in this document and suggests a proposed plan. It is a three-page document and somewhat in detail. He asks for Mr. Hazeltine's reaction to the proposed new workable plan.

Mr. Luckey: No comment, your Honor.

The Court: No. 997 is admitted.

(Office Memorandum of January 16, 1956, Herman to Hazeltine, previously marked Plaintiff's Exhibit 997/A-22 for Identification, was thereupon received in evidence.) [245]

* * *

Mr. Wiener: The next document is on the bottom of the page, April 4, 1956, from Hazeltine to Herman in San Francisco in which he tells him they are going to be out to Portland in the week of April 9th "in connection with the recasting of the present mortgage of Aleutian Homes, Inc."

Mr. Luckey: This just gives plans and itinerary.

The Court: No. 1019 is admitted.

(Carbon copy of letter of April 4, 1956, Hazeltine to Herman, previously marked Plaintiff's Exhibit 1019/22 for Identification, was thereupon received in evidence.)

Mr. Wiener: The next document is on page 210. It is the document quoted in full dated April 5, 1956, and No. 1021 has been assigned to it, and it is from Hazeltine to Cole.

Now several times earlier I have indicated what I consider to be certain key documents. This, your Honor, is one of them, and the reason why it is set

out in full. This is a document which provides the basis for certain action that was taken. It is tied in with the memo that we discussed a few moments ago from Herman in San Francisco where he had provided certain information about the finances of the project. Mr. Hazeltine comments to his superior with respect to the Completion Agreement, what happened during the course of the Completion Agreement, the fact that if they [251] foreclosed, the claims of certain creditors who relied upon the Completion Agreement would be eliminated. He points out if they foreclose, legal action by the creditors to enforce their rights under the Completion Agreement undoubtedly would follow. In that event, the Court might find for the creditors in view of the assurances given to the creditors in the Completion Agreement which was accepted by the Administrator.

Now here is somebody talking to the Administrator and the question—although I don't think it is material, your Honor—I mean I don't think it is determinative. I think it is material but not determinative as to whether in fact this was a binding contract as far as the HHFA is concerned, but certainly it would indicate by one of the top people, the man who was actually making all the decisions, Hazeltine here, that in his opinion on April 5, 1956, this particular document had been accepted by his agent.

He points out in this memo to his superior that, "The control of the project and all funds is under my jurisdiction and handled through the Project

Manager." He points out that the income from the project has been utilized to pay certain operating expenses. He says, "The financial condition of the project indicates that "We," "We," should look to recasting the present loan to provide principal payments to the Administrator in addition to interest. In order to accomplish this, an agreement will have to be reached with [252] all or a majority of the creditors listed."

So he comes up with two alternate proposals. They are both set forth there.

One of them suggests that the creditors be paid out of income after payment of operating expenses. He indicates that will take ten years to pay out in full.

The second one is that they tried to settle this with the creditors on the basis of 30-40 per cent, roughly $160,000.

He believes that the best course of action is the latter, that they try to settle these claims of creditors by paying 30 to 40 per cent, and he says that he has an opinion from legal counsel, HHFA legal counsel, that an increased loan can be authorized for this purpose.

He attaches to his memorandum an indication of the financial status of this corporation which indicates on his letter to his superior, Mr. Cole, that the income exceeds the outgo on a yearly basis by $19,344 after the payment of $282,456 to amortize the long-term loan plus interest and a service charge.

So his conclusion at this particular date appar-

ently was that the financial status of this project was sufficient to justify doing this; that a long-term loan was feasible; that there was sufficient income from this project to pay not only that but to pay operating expenses and still [253] have an annual excess of some $19,000.

Mr. Luckey: That is on the basis, your Honor, that the memorandum proposes that they try to settle with creditors at 30-40 per cent for $160.000 and to get the principals' release of any interest or claim that they might hold against the project, which would be the claims of Woodbury, Wynans and the others, so it was just a proposal that again didn't reach any ultimate determination.

The Court: 1021/A-22 is admitted.

(Carbon copy of letter of April 5, 1956, Hazeltine to Cole, previously marked Plaintiff's Exhibit 1021/A-22 for Identification, was thereupon received in evidence.) [254]

* * *

Mr. Wiener: The next item would be on page 212.

The Court: Page 212?

Mr. Wiener: Page 212, the bottom, April 16, 1956, [255] again a significant memorandum in the interim here, oral testimony, and it is at the bottom of page 212. That will be No. 1025, in our opinion a very significant memorandum in this case. Between the April 5th memorandum and this memorandum Hazeltine had visited Portland, and we will present testimony as to what happened at that meeting.

Mr. Hazeltine makes his report on his return from this trip to his superior, which ultimately led then to the final decision in this case to foreclose.

He reports that he visited Portland; that he conferred with Woodbury; that he thereafter, after the conference with Woodbury, learned that the Bank of California had obtained certain collateral from Woodbury which was—which the Bank was using to satisfy the obligation to it which was set forth in the Completion Agreement; that from this collateral assignment, or from this assignment of collateral, the Wynans obligation to the Bank had been cut, reduced from $150,000 to $60,000, and the Bank expected to be paid in full from this source.

Now you recall that the April 5th meeting, your Honor, had been—a proposal had been made and approved by Cole that all the creditors, including the Bank of California, be paid 35-40 per cent or whatever percentage figures were there. So he now he comes and reports that the Bank of California, as far as it is concerned, it has made other [256] arrangements to get its payment, and so he concludes, "When I assured myself personally by contact with the Bank on this matter that any relief which the Government might afford the Bank would result in actual cash dollar improvement of the position of Woodbury, the sponsor of Aleutian Homes, I broke off all further negotiations.

"It seemed to me a matter of principle that no positive action should be taken at the expense of the Government which might tend to enrich the sponsor of Aleutian Homes when his former actions still

jeopardize the position of the Government even though such an action might in some intangible way improve the future position of the project from the Government's standpoint."

His conclusion is that various types of litigation can now no longer be avoided.

Our comment on this particular document is that from this stage forward, from this date forward, the Government moved toward those ultimate steps which were culminated in June of 1957 by the foreclosure, that this was the basis, apparently, when they found that they didn't have to make arrangements to pay off the Bank of California, they decided to avoid any possibility of working this out in any way, basis, and to go back to their position that they had prior to the Completion Agreement.

Mr. Meyer: I would like to make a brief comment, your [257] Honor, that this appears from our knowledge of the files to be the first indication that the Government, or at least Mr. Hazeltine in charge, was approaching the long-range settlement of the project with the idea that Mr. Woodbury, who was listed in Stage Four, and some of these other creditors who were on Stage Three and Four, should not, and if he had anything to do about it, would not receive any consideration in the ultimate determination or liquidation of the project.

I might state that this appears to be the first time when he takes this position, stating that he is going to take it even if it is to the disinterest of the Government or even if it is going to be disadvantageous

to the Government, the Government's interest, to take it, they are going to take it anyway.

It will be tied up with oral testimony, your Honor, that the first indication the plaintiff had that this position had been taken is when they received foreclosure papers that were served a year later, in June.

Mr. Luckey: I think that plenty of latitude has been taken with the memorandum, your Honor. The memorandum must be considered in the light of the previous request that Mr. Hazeltine made to the Administrator to have a basis that he could go out and try to compose the creditors with. In that memorandum he represented to the Administrator that the [258] 30-40 per cent settlement with the creditors would not be made unless the principal or major contractors would release any interest or claim they might hold against the project. It was on that basis that the Administrator committed the fund for that purpose, and then when Mr. Hazeltine got to Portland and discovered that the claim that was involved with the Bank of California was one that Woodbury interests were satisfying, anything that was given Woodbury on creditor claims as distinguished from ultimately coming out through a sponsorship, if the project would eventually be beneficial and they should ultimately finance it in some way as distinguished from that, he had a position that would not jeopardize the interests of the Government and other creditors who would still be having money owed to them while Woodbury by

sponsor has under his guaranty received some benefits to him.

The Court: Exhibit 1025 is admitted.

(Carbon copy of letter of April 16, 1956, Hazeltine to Cole, previously marked Plaintiff's Exhibit 1025/A-32 for Identification, was thereupon received in evidence.) [259]

* * *

Mr. Wiener: The next item is the middle of page 220, December 11, 1956. 1098 is the number—excuse me, it is at the bottom of the page, 219. I skipped one. Bottom of page 219, second from the bottom, November 27, 1956, correspondence between HHFA General Counsel in Washington and the Cake firm in Portland. It is No. 1091. It comments on the case of Dougherty vs. Aleutian Homes presently pending at that time.

Mr. Luckey: It says, "* * * note the legal position you intend to adopt * * *."

The Court: 1091 is admitted.

(Carbon copy of letter of November 27, 1956, [266] Oakley Hunter to Cake, Jaureguy & Hardy, previously marked Plaintiff's Exhibit 1091/22 for Identification, was thereupon received in evidence.) [267]

* * *

Mr. Wiener: The next item is the one on May 21, 1957, where Cole writes to the U. S. National

Bank and, in effect, withdraws $122,300 from the funds of the Project Manager.

The Court: Is the Depository Agreement part of the record here?

Mr. Wiener: It is a part of the various documents, but it is not one that I have introduced. I mean it is one of these documents down here, your Honor. It certainly is part of the over-all picture. It is No. 1144.

The Court: Admitted.

(Carbon copy of letter of May 21, 1957, from Cole to United States National Bank, Portland, Oregon, previously marked Plaintiff's Exhibit 1144/23 for Identification, was thereupon received in evidence.)

Mr. Wiener: The next document is May 28, 1957, in the middle of the page, a transcript of a telephone conversation between Abell and Hazeltine, No. 1150, in which Hazeltine confers with Abell and says he talked to Holbrook to be the appraiser on this project, and Holbrook advised him he was going to make an appraisal for the receivership. He makes the comment about the fact that Langton will have to resign [274] and Abell says, "I thought Langton might become the receiver."

Hazeltine says, "That is O.K., but he would have to resign as Project Manager."

Abell says, "Well, we understand that."

And Hazeltine says, "He would be out no matter what happens unless the Court makes him the receiver.

"The minute he is out," Hazeltine says, "the books and files are all lying there for anybody to pick up and it would not be a good idea for them to fall into Aleutian Homes' hands. Discussed this very thoroughly with Hunter and find out if we should ask the Court for the files or what, but be sure somebody immediately gets hold of them and not Aleutian Homes—seal them up and hand them to the Court. Because if there is no action someone might get in ahead of us. Get on this right away."

Well, at least, as we see that, your Honor, one of the points we have set forth in our memorandum with the Government takes the position that, O.K., Langton was in fact Aleutian Homes, and, of course, our position is the other.

The Court: The Government does not take that position?

Mr. Wiener: The Government takes the position the reverse of ours, that Langton was Aleutian Homes and that they were in a different position.

Now, if, in fact, Langton was Aleutian Homes, and that is their official position at that time, then it seems [275] they would be concerned about these records. If they belong to Aleutian Homes, they belong to Aleutian Homes, but this seems to me consistent with their approach that they took during this period of time that in fact this was their project and these were records they wanted to make mighty sure that they do not get over to the corporation, which right now in this courtroom they take the position that this was—that Langton was Aleu-

tian Homes, not the Government. That is our theory anyway.

Mr. Luckey: This memo points out that they wanted to get the books in the hands of the Court so that they will be preserved, your Honor, rather than lost.

Mr. Wiener: That is No. 1150.

The Court: 1150 is admitted.

(Document, transcript of telephone conversation between Hazeltine and Abell, May 28, 1957, previously marked Plaintiff's Exhibit 1150/A-32 for Identification, was thereupon received in evidence.) [276]

* * *

Mr. Wiener: I am going to object again. I am going to object further, now, your Honor, on the question that my understanding of this case, of this segregated issue, is that we are talking about whether the Government had any control in this case—excuse me—as to whether the Government was a fiduciary in this case, and at least I don't see how this bears on that particular question at this particular time.

The Court: I do not see it either, Mr. Luckey.

Mr. Luckey: The only thing is, your Honor, Mr. Woodbury brought it out in his direct examination by saying in his conversation with Mr. Hazeltine back there it was mentioned and that he wanted to clear it up.

The Court: I think it is a matter that is not relevant [625] or material on the issue which we are trying here, and if it was developed on direct I didn't pay attention to it as having anything to do with the issue here. [626]

* * *

Mr. Luckey: Your Honor, under Rule 41 of the Federal Rules of Civil Procedure, I would respectfully submit to your Honor that the plaintiff has completed the presentation of its evidence and that the defendant is entitled to dismissal on the ground that, upon the facts and the law, the plaintiff has shown no right to relief.

Of course, I submit to your Honor first of all that the United States cannot be a fiduciary in this situation. I think, of course, the Restatement of the Law of Trusts is indicative of the Federal law in that regard. Certainly there is not a case here that Counsel has cited that would impose upon the Government any fiduciary responsibility in a case of this kind.

Now, I am sure your Honor has researched the problem and has a view on it so that further remarks or advice that I might make would be superfluous, and I will not burden the Court's time unless the Court feels in addition to our memoranda there are some questions or explanations that might be called for.

With reference to whether or not we were a fiduciary in this situation, I think it is important to

note [705] here that the United States was in the position only of a debtor-creditor with relationship to the debtor and that does not give rise to a fiduciary relationship. There is no allegation here and there is no proof of any overreaching. There is no proof of the United States assuming the obligation of a fiduciary, and under all the facts of this case there is no satisfactory establishment of the strong burden that one has in asserting fiduciary relationship on someone else, to establish the burden.

A fiduciary relationship is an equitable concept arising out of an assumption of the obligation to look out for another or in a position in equity, people being put in a position where the Court will say in the situation this party was one party, was to look out for his interest.

Now, there is nothing in these documents—in fact, to the contrary in the evidence, your Honor—that the Lender would not have continued to disburse those funds had he been in a position to lend under the original contract. That letter that Mr. Hazeltine wrote to Mr. Hardy who was dealing with these people out here, and Mr. Woodbury, indicates, and the Completion Agreement shows clearly that the Administrator would not have gotten into any situation that would have required him ever to respond as a fiduciary.

In addition to that, the Project Manager was the man through whom all these things were being done, and while [706] his action could be vetoed and he could be removed by the Administrator, he was the

party that was acting by actual delegation formally and properly, I submit, your Honor.

There may be some question in your mind about that with Aleutian Homes. He was delegated particular duties of disbursement nature, and it was a matter of seeing that these funds were properly accounted for in the balance of the loan. The creditors, the bonding companies, and people of that kind would not have stood still, as they did, for the extension by written agreement unless there was someone in whom they had confidence to incur continuation of the disbursement.

Certainly the HHFA on the one hand in the position to disburse the balance of the loan to the project and the creditors on the other hand coming to them and employing them to help complete this project should not be placed equitably in the position of a fiduciary and release Mr. Woodbury of all his guaranties, all that sort of thing, in a situation of this kind where they go to the Government, the HHFA, and ask that these funds be further disbursed.

Finally, I would like to say that there is a serious question, I believe, on the matter of jurisdiction, and that is a matter that I submit is before the Court at all times because the plaintiff here is relying upon matters and documents that they assert impose upon the Administrator a contractual [707] obligation.

If this action is in contract, the jurisdictional limit of this Court is exceeded by the claim, and

their action is here, apparently, under the Tort Claims Act. I suggest it is a tortious attempt to bring something that is based upon contract by all their presentation and theory of the case here under the Tort Claims Act. If the Court is without jurisdiction, this matter should proceed no further.

I am sure your Honor appreciates that they talk about our acceptance of the Completion Agreement. They say, "We did nothing wrong when we abandoned the commitment that Mr. Woodbury didn't provide overhead funds." He had an overhead fund obligation in connection with the employment of the Project Manager and his Overhead Agreement.

All those things, I submit to your Honor, impose upon the Court in this situation a problem as to whether or not they are actually attempting to proceed for a breach of contract, attempting to build something that is not supported by the Restatement or any other authority that I can find, and impose a fiduciary relationship. When the project goes sour as a result of contract obligations that cannot be met by the original lender is not something that will bring it within the Tort Claims Act. [708]

* * *

Mr. Luckey: I understand it may not have been physically introduced here, your Honor. As I understand it, by stipulation all the documents in the chronological listing were stipulated as admitted with the right of either party to read them in full.

Now this letter is described in the context of this deposition.

The Court: Mr. Luckey, when we started just about a week ago I said all that we were going to consider here, after you asked me to take this mass of material and let that go probably to the Appellate Court, that we were going to try out these particular things, and you would introduce those matters that you felt were of importance at this stage. I do not think there could have been a misunderstanding on that. [838]

* * *

Mr. Luckey: That would complete our evidence on this segregated issue.

The Court: Is there any rebuttal? [873]

Mr. Wiener: That concludes our case on this segregated issue, your Honor.

The Court: I have a few questions to ask, more in the nature of——

Mr. Wiener: One other thing: I don't know if you still want to ask Mr. Woodbury questions.

The Court: No. I have given consideration to that.

I want to get Counsel's thinking now on what we have tried here. I rather feel that we have tried at least one issue beyond what I had actually intended, but that may not be true.

Now that the Court has placed itself in the position of the parties, it may seem that such position would have little, if anything, to do, and I would

agree, with one of the primary questions here; that is the question of jurisdiction.

There were certain denials in the pretrial order of certain contentions that I was of the belief might raise an issue of fact—as to what actually occurred and as to what actually transpired—and I believe that it was necessary to proceed with the trial of these issues, the principal one which we have here. That is whether under these circumstances the Government could be a fiduciary.

On the Number 2, and that is: Was the Government in fact a fiduciary? Is there any other evidence —and I [874] think that this is important and you might want to consider it for a while—is there any other evidence that either one of the parties might want to offer on this particular subject, and that is if there was a breach of fiduciary relationship.

Now it seems to me that you have explored it. We have gone into rather thoroughly from both sides, although I would say in truth and in fact in rereading my order I am not sure that it was broad enough to cover that feature.

First of all, I would like to hear the plaintiff on the point.

Mr. Wiener: I think in our considered opinion, your Honor, our opinion would be that we probably have placed in evidence before this Court at this time, either through the records or through the agreed facts, not only the issue that you asked about—that is, the issue of whether our evidence bears on the question of a breach—but also to the agreed facts, the question of damages.

The Court: I would say this: If you would go along with the one point there and say what you want on the question of breach, that that is as far as I would want to go right at this particular moment.

Mr. Wiener: We know of no other evidence in this case that bears on that. I think we have got all the facts before the Court, as far as we know them, anyhow. [875]

The Court: That is fine.

Now, Mr. Luckey, what is your position on that?

Mr. Luckey: I think with the record as it stands, your Honor, and our motion on the jurisdiction, that at least at the moment we would have nothing further to add.

The Court: That would be on the question of breach either, if it would happen to be found. You would have nothing more to offer on the question of breach?

Mr. Luckey: Maybe I misunderstood your Honor. But I understood where the question of jurisdiction the matter of breach——

The Court: Well, now, the two things I mentioned, jurisdiction first, Mr. Luckey: Now, then, the other question was that if the Government could be a fiduciary then was it in fact a fiduciary; if in fact a fiduciary, was there a breach of the relationship?

After all, we are taking this in its logical order here. It would seem to me, and that is why the question came to my mind, it would seem to me

there has been just as much evidence offered on the question of breach here, or possible breach, if there is such relationship, as there was on the question of whether there was a fiduciary relationship.

Does the Government have any more testimony that it might want to offer on the question, if there was a breach [876] of the fiduciary relationship?

Mr. Luckey: Well, on the breach, as I understand it, your Honor, I think that we could be confronted with a lot of matters as to whether or not it was reasonable under all the circumstances. I think we have most of the material in, anyway, that would be involved with that, Mr. Langton's deposition, and so forth, which covers the point rather thoroughly. We have not attempted to document that thoroughly beyond Mr. Langton's deposition. I think, however, that with the documents in evidence that that would substantially be in a position to be presented to the Court.

Ths Court: What I believe is this: It has taken us a week now or approximately a week in this trial. I think it would be a very foolish thing for the Court now to adjourn, since we have gone ahead so far on it, if there was any other evidence to be offered on the question of breach. We have to get this case moving along. It has been here for a number of years, and I personally would prefer, since we have gone this far, to go ahead. I won't decide the question of damages. I would reserve that question, if I would ever get to it; I would reserve that question because that is something that could be threshed

out later. But I do believe that we are down to the point where if the case goes on appeal the Court on appeal at least will have before it everything with the exception of damages. [877]

Mr. Wiener: Yes.

Mr. Luckey: I think that the evidence is sufficient before the Court. There could be additional documentation, but I don't think——

The Court: I would say this then, and of course under the circumstances I would be extremely liberal, that if before the opinion of the Court is announced, and that will probably be some time, if either one of the parties feel they have something on this last matter which I have mentioned, the first question of a breach of this relationship, that I certainly would be inclined to hear any evidence that might be proper.

Mr. Wiener: All right.

The Court: And that would be either one of the parties.

Mr. Luckey: I can say this. I think any evidence that we would have on that would be purely a submission of documents, your Honor.

The Court: You have each submitted a trial memorandum. Should I hear plaintiff on whether we have additional briefs or memorandums which you would like to submit now before we speak of the argument of the case here?

Mr. Wiener: Your Honor, I think that with the full and constant attention this Court has given for five days and the thousands of—not thousands but

the many briefs that have been submitted and I am sure are in the Court's file, that [878] unless the Court would request further analysis of any particular phase of it I just don't know how we could supplement it any more. I just don't know what the Court would have in mind, and so far as we are concerned, I recognize our trial memorandum is very short, but my answer to your question is unless the Court desires further briefing I don't know what we can add for the Court's thinking on this matter or to assist the Court unless the Court asks us to, and of course then——

The Court: What is your thinking on oral argument, if you want oral argument? I would say this, Gentlemen, that my time on account of the fact that we have taken extra work here, that we may have some difficulty on that in lining up that feature except possibly during the early part of the Christmas week.

What is your thinking on it now, if you would care for oral argument? Do you think there is anything?

Mr. Wiener: I have thought about this before, and it appeared to me that it might be of benefit to the Court if—I realize that a lot of documents have been put in here—after you have taken a look at those documents perhaps that you would like to have us present our views.

The Court: You may be assured that I will do that if I feel that way; I will call you. I have not hesitated in doing that in other cases, and if I

feel I would like some [879] points straightened out I certainly will call on you.

Mr. Wiener: The thing that disturbs me, I feel we have not apparently put over our theory of this case to our opposing counsel after three years because he indicated something here—if we haven't convinced him in three years what our theory is I certainly would like to have the opportunity to at least expand our theory to the Court. Maybe the Court has got our theory.

The Court: I think I understand your theory.

Mr. Wiener: If the Court understands our theory, fine.

The Court: I think I understand your theory. Now that is, first, without making any commitment at this time; No. 1 on the jurisdictional question or on the question if in fact there has been a fiduciary relationship established, that certainly I understand that theory.

Mr. Wiener: All right, if the Court then understands our theory, whether rightly or wrongly, then I would say that we could benefit the Court only if the Court feels we could be of benefit, and I personally—we have expanded this at great length here on the same basis of the brief. So far as the evidence is concerned, if the Court feels he would like to hear us expand it—if not, we would not want a further argument.

The Court: Mr. Luckey?

Mr. Luckey: If the Court please, I don't think it is [880] so much a case of our inability to under-

stand their theory as it is to be able to get us to agree to it, but, at any rate, it is not in my mind to take any different position with reference to the argument than Mr. Wiener has stated. I think we have filed brief on top of brief so that your Honor already has a considerable burden in reading those briefs, unless there is some point that your Honor has that Counsel has neglected. I think in view of the voluminous documentation here that, again if the Court feels it has anything that it would like to inquire of Counsel, we would all be better advised after that.

The Court: Then I will take it to be under advisement. Of course, if I feel that you gentlemen can assist me on anything that may arise, I won't hesitate to call you back.

Mr. Wiener: May I make one inquiry, your Honor: I assume from what the Court has said that there still has not been a decision on the question of the jurisdiction of this Court under the Tort Claims Act.

The Court: No; that is true; that is true.

Mr. Wiener: I am hesitating because I am not quite sure how to frame this question, but I hope the Court and Counsel will indulge me.

If in fact we have a cause of action against the United States which may not be cognizable in this Court, that cause of action may still be cognizable in the United [881] States Court of Claims. My understanding of the law applicable to the Court of Claims is that if a case is pending against the

United States in another court, then it is grounds for dismissal in the Court of Claims.

Why I am hesitating to say this is perhaps obvious, but the statute of limitations would run against the plaintiff in this case and my client, Mr. Woodbury, sometime probably during the year 1961 or at the earliest, I would say, sometime during the year 1961. I am only struggling for words, but what I am trying to say is that if this case is going to be decided on the jurisdictional question we still have a remedy elsewhere. Of course, if you decide on the merits that ends it one way or the other. I am merely calling up—perhaps the Court is cognizant of the fact that we had an alternate choice, but we selected this forum because this was proper, and if the Court——

The Court: I would say this, Mr. Wiener: Of course, anything that I would say now would be at a point where I have not decided on the jurisdiction, but, certainly, I would feel this way about it, that with so much money as your client has obviously involved here, if the Court felt there were some rights and those rights could be saved, the Court would be inclined to do that.

Mr. Wiener: All right, I just wanted to call the Court's attention to that fact.

(Trial Concluded.)

[Endorsed]: Filed October 9, 1961. [882]

In the United States District Court
for the District of Oregon

CERTIFICATE BY CLERK

United States of America,
District of Oregon—ss.

I, Keith Burns, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Defendant's motion to dismiss and in the alternative for summary judgment; Defendant's memorandum on motion to dismiss, etc.; Defendant's reply brief re motion to dismiss, etc.; Order denying motion to dismiss; Answer; Reply to counterclaim; Order that answer and counterclaim of defendant be stricken, etc.; Motion to file certain documents; Defendant's motion that defendant's answer and counterclaim heretofore stricken be reinstated; Order reinstating defendant's answer and counterclaim; Defendant's request for admissions; Plaintiff's answer to request for admissions; Plaintiff's amended answer to request for admissions; Amended counterclaim; Reply to amended counterclaim; Plaintiff's interrogatories; Plaintiff's request for admissions; Defendant's answers to plaintiff's interrogatories; Defendant's replies to plaintiff's request for admissions; Order on defendant's objections to request for admissions and defendant's objections to plaintiff's interrogatories; Answer to plaintiff's in-

terrogatory No. 20 (b)(1); Pre-trial order; Order reserving decision on motion to dismiss; Stipulation re depositions; Opinion of Judge John F. Kilkenny; Judgment of dismissal; Notice of appeal by plaintiff; Bond for costs on appeal; Designation of contents of record on appeal; Statement of point; Defendant's motion to set counterclaims for trial, etc.; Certificate and order; Defendant-appellee's designation of contents of record on appeal; Supplementary designation of contents of record on appeal; Order denying motion for consolidation; Motion and order extending time to docket appeal; Order denying motion to vacate; Supplemental pre-trial order re amended counterclaim; Stipulation and order removing case from calendar and Transcript of docket entries constitute the record on appeal from a judgment of dismissal of said court in a cause therein numbered Civil 9403, in which Ray B. Woodbury is the plaintiff and appellant and United States of America is the defendant and appellee; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and appellee, and in accordance with the rules of this court.

I further certify that there is being forwarded under separate cover the reporter's transcript of proceedings in four volumes. The exhibits are to be retained in this office until further order of the Court of Appeals or until ten days before the date set for argument on this appeal.

I further certify that the cost of filing the Notice of Appeal, $5.00 has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 10th day of October, 1961.

[Seal] KEITH BURNS,
Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 17585. United States Court of Appeals for the Ninth Circuit. Ray B. Woodbury, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed and Docketed: October 13, 1961.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 17,585

RAY B. WOODBURY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINT

The point on which appellant intends to rely on this appeal is that the United States District Court for the District of Oregon committed error when it concluded as a matter of law that it did not have jurisdiction of appellant's claims under the Tort Claims Act and thereupon dismissed appellant's complaint and the causes of action set forth in said complaint.

KING, MILLER, ANDERSON, NASH & YERKE,

/s/ NORMAN J. WIENER,

/s/ JEAN P. LOWMAN,

Attorneys for Appellant.

[Endorsed]: Filed October 30, 1961.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER

Whereas the record herein includes approximately 309 exhibits, many of which are voluminous in size, and

Whereas it is not feasible or economic to include said exhibits in the printed record on appeal

Now, Therefore, it is hereby stipulated by and between the parties hereto through their attorneys that subject to the approval of the court an order may enter

1. That the exhibits in the above-entitled cause need not be included in the printed record on appeal; and

2. That the original exhibits herein shall be made a part of the record on appeal.

Dated this 31st day of October, 1961.

/s/ NORMAN J. WIENER,
Of Attorneys for Appellant.

ROGER G. ROSE,

By /s/ SIDNEY I. LEZAK,
Assistant United States Attorney, of Attorneys for Appellee.

It Is So Ordered: Nov. 1, 1961.

/s/ RICHARD W. CHAMBERS,
United States Circuit
Court Judge.

[Endorsed]: Filed November 1, 1961.